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Analysis of contract litigation to determine the focus of quasi-legal study for higher education professionals.

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ANALYSIS OF CONTRACT LITIGATION TO DETERMINE THE FOCUS OF QUASI-LEGAL STUDY FOR HIGHER EDUCATION PROFESSIONALS

A Dissertation Presented

by

Mary Elizabeth O'Leary

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Education

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Dedication

To the memory of my parents, the late

John A. and Elizabth C. O'Leary

who taught me love and the value of an education

Acknowledgments

Many people have assisted me in the process of this study. I would like to express my appreciation to all and to recognize those principally involved.

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Special recognition must be given to my deceased mother, who not only inspired and supported me throughout this research, but in the last days of her life organized my case citations into alphabetical order for the bibliography.

My fourteen-year-old niece, Betsy Moriarty, was an invaluable assistant. She spent many hours with me in the Western New England School of Law library cross referencing case citations.

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Abstract

Analysis of Contract Litigation to Determine
the Focus of Quasi-Legal Study for
Higher Education Professionals

(February 1979)

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The purpose of this investigation was to carry out a systematic analysis of Massachusetts case law in order to identify basic concepts of the law of contract, and to synthesize provisions of Massachusetts General Laws relating to the formation and execution of contracts in public higher education. One hundred sampled cases involving the law of contract and public higher education were analyzed to determine the most frequently litigated areas of contract law, thereby identifying primary domains of needed quasi-legal training for the education profession.

The premise or implicit hypothesis of this study is that faculty and administrative personnel in public higher education need to know basic concepts of the law, but the majority of them have not had formal educational preparation in the field of law. Thus, a marked dichotomy exists between what is and what should be. This is the problem that this research has addressed.

School law research, a subset of historical research, was utilized in this dissertation. Historical research was the approach of choice, since it allowed the focus of this study to be on the development of law of contract in the Commonwealth.

The process employed was an analysis of basic contract case law and a synthesis of it from the referenced cases. The data reported are a tri-parte presentation: (1) a briefing of 100 cases in higher education and an analysis of them in relation to the area of the law of contact which is in issue; (2) citations of the Massachusetts General Laws which relate to the study; and (3) basic concepts of the law of contract.

Major findings of the study are: 1. Contract litigation in higher education and the law of contract goes back to the early nineteenth century (1819). 2. There are recurrent issues within the law of contract that have deep historical roots. 3. Sixty percent of contract litigation

according to this sample emanate from faculty. The other forty percent are almost evenly divided between students (twenty-two percent) and institution-initiated (eighteen percent) actions. 4. Fifty-eight of the cases involved "Performance and Breach." Of these, fifty-five percent were in a combination of two categories (of eight)--"Expressed or Implied" and "Offer and Acceptance."

Six major conclusions are derived from the analysis of the data: 1. Legal history informs on pertinent issues relative to contract law and public higher education. 2. The cognitive content of quasi-legal training for faculty and administrative personnel in higher education should be primarily in seven areas: (a) Performance and Breach, (b) Offer and Acceptance, (c) Expressed or Implied, (d) Capacity, (e) Fraud, Mistake and Duress, (f) Illegality and (g) Consideration. 3. Quasi-legal education is needed for all professional personnel in public higher education. 4. Preventive quasi-legal education for all professional personnel, those who contract with professional personnel (administrators), and to a lesser degree students, would enhance the internal harmony of institutions of higher education. 5. Quasi-legal education programs should begin to focus on student-initiated litigation. 6. Elimination of misunderstandings of contractual relationships would reduce both monetary and human

costs.

On the basis of the principal findings, recommendations are made that further studies be initiated in two areas: (1) collective bargaining, and (2) student initiated litigation.

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THE PROBLEM AND ITS SETTING

Purpose of the Study

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Delimitations

This study was delimited to: (1) one area of the civil law , i.e., the law of contract; (2) individual contracts vis-a-vis collective bargaining contracts; (3) contract law of the Commonwealth of Massachusetts; (4) litigation in higher education involving contract issues; (5) Massachusetts General Law which relate to the formation

and execution of contracts by faculty and administrative personnel in public higher education.

Basic Assumptions

In the formulation of this problem and its implicit hypothesis, three basic assumptions were made. They are: (1) public higher education is interfaced with professional education; (2) inter-agency contacts are negotiated by agents of institutions of public higher education to provide clinical facilities for use in professional education; and (3) the effect of the economy on public higher education of the Commonwealth will necessitate improved management, increased productivity, and cost control.

Definition of Terms

Since the law, as other professions, has a vocabulary peculiar to itself, the definition of terms is incorporated into the treatise when necessary for the purpose of clarity. Other terms are listed in Appendix I.

Research Methodology

School law research, a subset of historical research, was utilized in this study. Historical research was required to trace the development of the law of contract in the Commonwealth of Massachusetts.

School law research was used to demonstrate the effect on educators and administrators of public higher education of the concept of "legalism" as it exists today, i.e., as an enabling mechanism to understand the present in light of the past.

> An understanding of the history of education (including legal history) is important to the professional worker in this field. It helps him to understand the how and the why of educational movements that have appeared and in some cases, continue to prevail in the schools. It helps to evaluate not only lasting contributions, but also the fads and "Bandwagon" schemes that have appeared on the educational scene, only to be discarded.[1]

An understanding of the development of the law of contract is important to the faculty and administrative personnel in public higher education. It helps them understand the how and why of the "legalism" of today's society and its educational input, which is beginning to be noticeable. In some instances, "legalism" is proliferating critical issues in public higher education. Such knowledge will also help the educator to evaluate not only what is the law, but also the basic fallacies which often surround law related controversy. The level of knowledge required by administrators and faculty in public higher education today is not an indepth one, but a working one.

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[1]John W. Best, Research in Education (New Jersey: Prentice Hall, Inc., 1970), p. 96.

Need for and Significance of the Study

Higher education is diversified and pluralistic. Two different fractions of society control it: (1) the public sector and (2) the private sector. At the same time, two forces affect it, namely, internal and external forces. The internal forces are its component parts: the trustees, administrative personnel, faculty, classified personnel (other professional and non-professional employees), and students. The external forces are the federal, state, and local government, as well as private and public accrediting (approving) agencies.

The external forces, through the medium of statutory and regulatory power ("police power"), have imposed controls over the internal forces in the operation of the business of higher education. Since the law is defined as the study of man and his interaction, the law directly affects both the control groups and the forces affecting them.

Both the decision-making process and the decision makers are affected by the law. One area of the law is especially significant as an operational tool in the "modus operande" of higher education, i.e., the law of contract. Major factors have directly influenced the use of contract law in higher education and in doing so have highlighted the need for and the significance of this study. These

factors are: (1) the proliferation of laws impinging on contract relations; (2) evidence of escalation in the number of legal cases which involve issues of higher education; and (3) the dollar and psychic costs of litigation.

The Proliferation of Laws Impinging on Contract Relations

The commerce clause of the United States Constitution empowers the federal government to regulate whatever moves in or affects interstate commerce. Accordingly, the federal government through the National Labor Relations Board, has regulated labor and management relations in higher education. The contract of employment (individual contract) is a prerequisite to and inherent in the relationship of labor and management.

The federal government through financial controls has influenced, and in some instances regulated: (1) hiring practices (non-discrimination); (2) privacy of records; and (3) student conduct (student loan programs) through the following legislation which ramifies into contract negotiations:

Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d). This law applies to all colleges and universities which receive federal financial assistance for any purpose. It prohibits discrimination in, exclusion from, or denial

of benefits of programs receiving such financial assistance.

Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e) - as amended in 1972. This legislation applies non-discriminatory standards to the colleges or universities as an employer. It covers employment of faculty, as well as non-professional personnel.

Title IX of the Higher Education Amendment of 1972 (20 U.S.C. 1681-1683). This law provides for non-discrimination on the basis of sex.

Educational Amendments of 1974 (20 U.S.C. 821). This legislation sets forth the "Family Educational Rights and Privacy Acts of 1974, "which allows the parent (or student who is of majority age) to inspect and review all official records, files, and data directly related to children (or self), including all material that is incorporated into the cumulative folder.

Rehabilitation Act of 1973. This law provides for non-discrimination on the basis of handicap.

Federal Equal Pay Act of 1963 (29 U.S.C. 206 1d). This legislation requires "equal pay" for "equal work," regardless of sex for all employees who are covered by the Federal Labor Standards Act. It includes institutions of higher education.

The Age Discrimination in Employment Act of 1967 (29 U.S.C. 621). This law prohibits discrimination in employment because of age.

Office of Federal Contract Compliance Order 32 F.R. 14303 and Executive Orders 11246 and 11375. These executive orders (laws) require non-discrimination in the administration and performance of federal contracts over $10,000. In addition to compliance assurances, they require that affirmative action plans be filed by private institutions which have more than fifty employees.

Specific legislation in the Commonwealth which has affected contract law in higher education is as follows:

M.G.L., Ch. 15 sec. 19B. This statute provides for the indemnification of public officials. Questions of personnel liability have arisen for trustees, administrative personnel, and employees of institutions of higher education.

M.G.L., Ch. 180 A, added by Chapter 886 of the Acts of 1975. This statute authorizes trustees in the management of institutional endowment funds to appropriate and use capital gains, realized and unrealized. This legislation clarifies the right of trustees in the exercise of individual contracts in the operation of institutions when budgets are restricted.

M.G.L., Ch. 225, sec. 13K. This law requires notice of termination of student contracts, requiring tuition refunds

applying to proprietary schools.

M.G.L., Ch. 69, sec. 31C. This statute requires disclosure of accreditation of non-accreditation status of the school after the student is accepted by an instiution.

Escalation of Legal Cases Involving Higher Education

Litigation involving colleges and universities has increased during the past few years. The number of court decisions involving faculty employment increased this year over the previous years. Non-renewal of contacts of employment, coupled with retrenchment procedures, reflect the national trends in higher education. Decreased birth rates, inflation, and lack of military evasion incentives contribute to the fact that enrollments in colleges and universities are not equal to the "Golden Years" of the sixties. Issues of the seventies revolve around affirmative action and non-discrimination. Higher education has been forced to choose alternatives to meet the growing social and economic pressures. Institutions have reorganized their offerings and educational priorities. Therefore, legal issues relative to the law of contract with respect to the contract of employment have been frequently introduced in the courts.

The unique status of faculty members in their relation to the institution of higher education has complicated the

issues and resulting disputes which have arisen in relation to the law of contract. It should be noted that the issues have been determined in the courts by applying the law of contract to the facts of the case.

Case law involving the law of contract and higher education is a dramatic omen of the inclination of citizens to seek redress through the courts.

Contracts of employment have not necessarily been clear documents in higher education. As case law demonstrates, the terms of employment for faculty may arise from express or implied agreements, faculty handbook, or statutes. Under these contracts, faculty may be classified as tenured or non-tenured. The two leading cases in higher education based on non-renewal of a contract are: (1) Board of Regents v. Roth,[2] and (2) Perry v. Sinderman.[3] These cases held:

> The due process clause of the Constitution does not require that a non-tenured professor receive a hearing or written response prior to the non-renewal of his contract unless he can show that the non-renewal was a deprivation of an interest in "liberty" or that he had a "property interest" in continued employment.[4]

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[2]Board of Regents v. Roth, 408 U.S. 564 (1972).

[3]Perry v. Sinderman, 408 U. S. 593 (1972).

[4]Perry v. Sinderman.

The courts have also held that a contractual relationship exists between the student and the institution regarding academic matters. The institution determines the criteria for successful completion of courses, programs, and for graduation. If the student does not meet the criteria, he may be dismissed. If the institution of higher education fails to meet its standards, then the student may seek judicial relief in an action for breach of contract.

The court has noted that in academic dismissal cases, the student has the legal right to be advised of his academic deficiencies prior to termination. He does not have a legal right to due process (notice and hearing). With the advent of "consumerism" in society and this concept being applied to the student-faculty relationship in higher education, the need for faculty to be aware of basic contract law is even more significant.

Mahavongsanan v. Hall[5] is a case which well demonstrates the need for a quasi-legal understanding of the law of contract by faculty and administrative personnel in higher education (Re: pp. 72-74). In this case, the plaintiff, a graduate student, contended that the bulletins and catalogs of the university in effect at the time she enrolled constituted a contract and that the university should be ordered to grant her a degree. She completed the required

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[5]Mahavongsanan v. Hall, 592 F. 2d 448 (1976).

course work but failed the comprehensive examination on two occasions. She held that the examination requirement came into effect after the date of her enrollment and should not apply to her. Issues all were in relation to contract law. The student won in the federal district court but the federal court of appeals reversed the district court's decision.

In relation to the student's charge that the university breached its contract with the plaintiff, the court held:

> . . . implicit in the student's contract with the university on matriculation is the student's agreement to comply with the university's rules and regulations, which the university clearly is entitled to modify so as to properly exercise its educational responsibility.

The Dollar and Psychic Cost of Litigation

Values in society in the seventies have changed. Educators have integrated within themselves and the system of higher education the changing societal values. Faculty and administrative personnel have taken on the "consumerism" value system of this decade. The growth in size of institutions of higher education, the shift to the public institutions, and the trend toward consolidated coordinating agencies have affected decision making and, consequently, the individual contract of employment of faculty and administra-

trative personnel in higher education. They have also affected the individual contracts for learning. Because of these factors, institutions of higher education are making substantial changes in the system of internal governance. "Accountability" is the issue of the day. The courts have reinforced the continuation that institutions and individuals who provide educational services must be "accountable" to one or more groups in relation to their behavior.

Coupled with "accountability" is the currently predominant value of the preservation of substative constitutional rights, as well as statutory rights. Though educators are not litigious by nature, they have reverted to the courts for resolution of constitutional and statutory issues arising in their employment. The cost of such controversy is high. In the majority of cases the educator has borne the financial burden of the litigation personally. In the light of the individual's value, the importance of the issue--at least at the outset--is held to outweigh the dollar cost. In addition to the monentary expenditure, however, litigation has also imposed a psychic price on the litigee. William Van Alstyne clearly puts this forth when he said:

> . . . the burden of proof falls upon the plaintiff-teacher and is often exceedingly difficult to carry;

> and the ordinary case may not reach judgment for months or even years after the plaintiff has been separated from job. In addition, there is a practical recognition that the extralegal hazards of such litigation are themselves great: to sue and to lose is to establish a public record against oneself as a teacher and further to prejudice one's chances for employment or advancement. To sue and to win will ordinarily not make it possible actually to resume teaching at the institution in most instances, and it will almost certainly spread upon the public record whatever evidence of the plaintiff's shortcomings the defending institutions can muster--thereby warning off other institutions who sue their employer and launder their linen in public.[6]

In this period of economic recession, the purpose of higher education remains the production of knowledge. However, the nature of the production is presently unsure. Higher education today is being challenged to be what it claims to be rather than what it is. Intellectual capacity cannot continue to increase at the expense of the ability to understand, relate to, and emphathize with other people. It is necessary that consumers, as well as educators, respond to the "human condition" in addition to achieving technical and conceptual requirements of an educational program.

At the same time, America's institutions of higher education have evolved into massive business enterprises with priority issues challenging the structure and process

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[6]William W. Van Alstyne, "The Rights of Teachers and Professors," The Rights of Americans: What They Are - What They Should be, ed. by Norman Dorsen (New York: Vintage Books, 1971), p. 558.

of decision making in United States higher education: (1) institutional independence, (2) the role of the board of trustees and the president, (3) collective bargaining, (4) rules and practices of academic tenure, (5) student influence on the campus, and (6) the decision-making process.[7] Priority issue #4 is relevant to this research.

Colleges and universities grew rapidly in size and complexity in the 1950's and 1960's. The management of the escalating enterprises became full-time jobs. In this process, two distinct management systems developed: (1) the collegial model and (2) the business management model. In the collegial model, administrators have been appointed from the faculty ranks. The business model has infiltrated the ranks of collegiate administration with individuals whose primary training has been in management. To the extent that the business model has taken hold, the condition to which this study is addressed has been mitigated, but there is little evidence of "professional" managers taking over higher education. The traditional route to institutional leadership through the academic ranks still prevails, that is, higher education is still dominated by the collegial model. In this model, the administrators have come from the academic ranks and have not necessarily been equipped with the "tools" to perform their administrative

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[7]Carnegie Commission on Higher Education, "Governance of Higher Education: Six Priority Problems" (April 1973).

tasks. Among the tools they lack is legal knowledge, particularly with reference to the execution of contracts.

Administrators within the collegial model need to have a quasi-legal understanding of the law, as well as excellence in their academic disciplines. Excellence only in academia, for an administrator in higher education in 1978, is not logical in our legal society. Whatever the merits of the collegial model--and there are presumed to be many--the management of higher education by "gifted amateurs" without augmentation of their academic training is no longer feasible.

In the 1970's, the fluid labor market, new technological jobs, diversified life styles, and economic pressures have affected educational needs. Tenure quotas, faculty retrenchment, restricted budgets, increased work loads and phase outs of educational programs have been imposed by the administrative hierarchy with little or no consultation with those affected. Faculty have been regarded as employees and their traditional academic value, namely, tenure is under attack.

Faculty, and in many instances administrative personnel, have secured their employment and maintained their status under the individual employment contact which in public higher education led traditionally to the statutory

based tenure system. Academic tenure has been challenged for diversified reasons since its inception in 1915. It was in that year that the American Association of University Professors was formed to protect the academic community from unfair and arbitrary practices. During its first year, the committee on Academic Freedom and Tenure of the American Association of University Professors was involved with eleven cases of alleged infringement of academic freedom.

In 1973 the Commission on Academic Tenure in higher education issued a report entitled "Faculty Tenure" which indicated that an estimated ninety-four percent of all faculty members in American universities and colleges were serving in institutions which conferred tenure.[8] The Carnegie Commission on Higher Education, in 1973, reported that by 1990 the percentage of teachers with tenure could be up to 90 percent.[9] Therefore, this Commission predicted a widespread tendency toward "judicalizations" of the issues on college and university campuses.[10]

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[8]Commission on Academic Tenure in Higher Education, "Faculty Tenure" (March 1973).

[9]Carnegie Commission on Higher Education, "Priorities in Action" (October 1973).

[10]Ibid.

Two major responses appear to be arising in response to the attack on tenure. These responses tend to be inherent in response to the changing roles and relationships in higher education, namely: (1) faculty unionization and (2) substitution of term contracts for tenure commitments.

Unions tend to facilitate a bargaining process which is an orderly, neutral mechanism for resolving issues into a bilateral mutual binding agreement enforceable under law. Unionization in the United States demands separation of management and employee, the latter being the faculty. Faculty cannot be both the employer and employee.

The term-contract system is a means by which an institution issues contracts for a specified period. After this period, the professor's employment would be terminated unless another agreement were negotiated.

Therefore, irrespective of the alternative accepted, it is necessary for faculty and administrative personnel in public higher education to have a quasi-legal knowledge of the basic concepts of the law of contract to ensure their economic well being in 1978. Employment for faculty and the inherent academic freedom so valued by education will conceivably in the future be terms of a contract, be it individual or collective.

Institutions of public higher education cannot function effectively and safely without their employees

having a working knowledge of the law of contract or the legal structure of their employer. While professional legal counsel is available to institutions to oversee the legal aspects of their major operational functions, there is often no such provision for avoiding or resolving minor disputes which may be equated to hidden cancerous lesions which will cripple and can ultimately kill an institution.

It should be noted that since the sixties, with the surge of focus on students' rights, college educators and administrators have recognized the need for a constant flow of legal information. At the outset of that decade, in a litigation known as the Dixon Case (Dixon v. Alabama State Board of Education),[11] due process rights for students in institutions of public higher education were ajudicated.

> Facts: Several Alabama State college students participated in a sit-in at a lunch grill. Some of the students were expelled while others were placed on probation. The disciplinary action was imposed on the students without their receiving notice of the charges against them. They also did not receive a hearing prior to the disciplinary action. Judgment was for the defendant Alabama State Board of Education in the United States District Court and the plaintiff students' appeal.
>
> Issue: Does due process require that students receive notice and some opportunity for a hearing before they are expelled for misconduct in a tax supported college?
>
> Decision: Yes.

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[11] Dixon v. Alabama State Board of Education, 294 F. 2d 150 (1961).

Reasoning: (1) In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the Board from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. (2) The State cannot condition a privilege upon the renunciation of the Constitutional right to procedural due process.

This case is relevant to this study as this decision triggered the beginning of a chain of legal decisions. Today students in general are aware of their legal rights. They take a wide variety of issues to court. Studies of the colleges' responses to student litigations show that college administrators and attorneys have been unprepared to answer issues raised by students. The organizational behavior of the institutions of public higher education has become that of crisis management, stemming in a large part from minimum knowledge of legal parameters.

Legal reporting systems have developed over the past decade to publish up-to-date legal decisions. These services cover all aspects of the law from basic civil law to taxation. Information is voluminous and not readily accessible to the educator or administrator in reference to a single, specific topic-issue or area of the law, not to mention a specific jurisdiction. More significantly, little information is available as to how the law relates to the operation of institutions of public higher education and the contractural rights of administrators, faculty and

students within these institutions.

The United States District for the Western District of Missouri sitting en banc (45 R.R.D. 133) issued a significant and comprehensive statement on the relationship between the courts and education:

> Education is the living and growing source of our progressive civilization, of our open repository of increasing knowledge, culture and our salutary democratic traditions. As such, education deserves the highest respect and the fullest protection of the courts in the performance of its lawful missions.
>
> There have been and no doubt in the future there will be instances of erroneous and unwise misuse of power by those invested with powers of management and teaching in the academic community, as in the case of all human fallible institutions. When such misuse of power is threatened or occurs, our political and social order has made available a wide variety of lawful, non-violent, political, economic. and social means to prevent or end the misuse of power. These same lawful, non-violent, political, economic and social means are available to correct an unwise but lawful choice of educational policy or action by those charged with the powers of management and teaching in the academic community.

It should be noted here that erroneous misuse of power can be actualized in the making of unconstitutional contracts--illegal contracts--fraudulent contracts, etc.

The courts have long since declared that the relationship of enrolled students to a private institution is contractual. Similarly, Krawez v. Stans established the contractual nature of transactions between enrolled stu-

dents and the agents of public institutions.[12]

Facts: Federal Narcotics Agents and a Nassau County detective questioned midshipmen at the United States Merchant Marine Academy concerning the use of marijuana on the campus. The questioners acting as agents for the Academy assured the students that they could be "frank" and "speak freely," since nothing they said would be held against them. After the midshipmen admitted their use of marijuana on campus, they were suspended from the Academy.

Issue: Does an offer made by authorized agents of an institution, and the acceptance of that offer by students, constitute a binding contract between the institution and the student?

Decision: Yes.

Reasoning: As agents, the questioners were authorized to make promises to the students concerning the use of their statements. They told plaintiffs that if they spoke freely, nothing they said would be used against them. Plaintiffs, by speaking freely, accepted this offer, and a contract was made. The Academy is bound by this agreement. It cannot use as evidence in disciplinary proceedings admissions made by plaintiffs to the agents.

Arbitrary dismissal of the midshipmen on the basis of immune testimony manifested blatant ignorance of fundamental concepts of law. The monetary costs of such ignorance are considerable; the emotional costs to individuals and the damage to the reputation of the academy are incalculable.

Krawez v. Stans in a sense is the epitome of the problem. Ignorance of basic legal principles precipitated unnecessary expenditure of public monies and did irreparable damage to individuals acting in good faith. The signifi-

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[12]Krawez v. Stans, 306 F. Supp. 1230 (1969).

cance of this study lies in its modest substantive contribution to the means for eradicating legal ignorance and ultimately avoiding the consequences of such ignorance that the public can ill afford and will not abide.

CHAPTER II

REVIEW OF THE LITERATURE

Background research pursuant to the present investigation proceeded along several lines, including a computer search for extant studies, surveys of interpretative literature in academic and business management, law-related education literature, contract law (in general), landmark cases in contract law, and seminal commentary on basic and contract law. The initial inquiry was generally useful insofar as it reinforced the researcher's implicit hypothesis--that faculty and administrators in higher education need quasi-legal knowledge beyond what presently characterizes the profession of education. In particular, elements of the literature justified the researcher's focus on substantive aspects of contract law, supported the election of an historical case study methodology, and--by omission--revealed the potential of the current study for contributing significantly to the literature.

Computer Search

An ERIC computer search was used to initiate the investigation. The researcher was unable to find explicit treatment of the subject of her inquiry. Only fifteen

research projects which involve the law of contract existed at the time of the undertaking of this study.

The researcher categorized these fifteen studies into four areas: (1) due process, (2) tenure, (3) collective bargaining, and (4) other. This categorization was as follows:

(1) Due Process

"Termination and Due Process"
"The Process that is Due"
"The Case of the Expectant Professor and Other Mysteries"

(2) Tenure

"Security of Tenure: The Position of Academic Staff in English and Welch University Institutions"
"Academic Freedom, Professional Responsibility, and Tenure in the Utah System of Higher Education, Statement of Policy Adopted by the State Board of Regents, December 20, 1973"

(3) Collective Bargaining

"Resources on Academic Bargaining and Governance"
"Collective Bargaining Comes to Campus"
"Collective Bargaining on Campus"
"Dues Check Off and Union Security Study"
"Grievance Procedures in Higher Education Contracts"

(4) Other

"The College Catalog as a Contract"
"Recent Development in Two Year Community College Law: Student, Faculty and Tort"
"First Level Management: Legal Implications and Responsibilities for Selection and Retention of Faculty"

"Bibliography of School Law Dissertations"
"Policy, Documents, and Reports of the American Association of University Professors"

The investigator postulated that though the law of contract is inherent in these studies, only one in the "Other" category treats of the law of contract per se. This study is termed: "The College Catalog as a Contract." Sections of the substantive law of contract are applied to the dictum of the catalog in this study, establishing its relationship to the present investigation, since "Catalogue" issues cluster around the area of Offer and Acceptance of the law of contract.

The three studies in the "Due Process" category relate to the constitutional right of faculty to due process. The research projects categorized under "Tenure" and "Collective Bargaining" focus on specific statutory rights and contribute nothing to the researcher's investigation. Similarly, the ERIC Clearinghouse maintains a file of faculty contracts and faculty handbooks. These are objective manifestations of the form of the contract and the terms of the inherent descriptors, which contribute nothing to the understanding of the substantive law of contract and, therefore, to this study.

Literature of Academic and Business Management

Since the focus of this study is on the individual contract and collective bargaining, as the name implies, leads to a group contract, that is, a contract in behalf of all members of a bargaining unit, collective bargaining contracts lie outside the scope of this study. Moreover, since the statutory law and precedent which control collective bargaining are distinct from the common law, statutes, and precedent that control individual contracts, collective bargaining contracts are not within the delimitations of this study. Therefore, the aforementioned publications do not make a contribution to this research.

In the area of business management, since 1968 five general works have been published. They are: (1) Friedman, Contract Law in America: A Social and Economic Case Study; (2) Kessler and Gilmore, Contracts: Cases and Materials; (3) Gordon and Kurzman, Gordon's Modern Annotated Forms of Agreement; (4) Cappola, Law of Business Contracts; and (5) Wincor, Law of Contract.[13] These works are broad in scope and a minimum of eight years old. Contract law in many instances has been modified or changed by legal decisions rendered between the publication of these works and

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[13]Paul Wasserman et al., Encyclopedia of Business Information Sources (Detroit: Gale Research Co.), p. 177.

the current investigation. Kessler and Gilmore, Contracts: Cases and Materials, as a case study approach, informs the methodology of this study. Four handbooks and manuals have also been published which are subject to the same variables, namely scope and age.

Literature of Education

A review of the literature in education reiterates the need for this study. The literature does not share information on specific aspects of the law but focuses on failure of the faculty and administrators in higher education to know it. Schimmel in his article, "The Bill of Rights and the Public Schools: Change and Challenge," indicates that educators today have hidden agendas--lessons in legal hypocrisy based on their own lack of information. He alleges that educators seem to be doing everything they can--except teaching the way the courts have applied the Constitution to the classroom and applying the Bill of Rights to students and teachers in the schools.[14]

A Legacy of the Past

> Why don't most educators teach and apply the Constitution? One reason is that many do not understand when or how the Bill of Rights is applicable to the schools. This is because these rights did not apply to them when they were students and

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[14] David Schimmel, "The Bill of Rights and the Public Schools: Change and Challenge," Social Education (Virginia: National Council for Social Studies, April 1975), p. 209.

> because they learned almost nothing functional about the subject during their schooling. Even courses which taught the history and principles of the Constitution rarely considered their application to the public schools. Thus, since many teachers and administrators have had almost no education or personal experience in this area, they are poorly prepared to apply the Bill of Rights in the schools today![15]

Schimmel further indicates that one reason that the current legal decisions are not found in the school curriculum is that many teachers do not know about the cases, or if they do, they do not know where to find them. A second reason he identifies is that educators see these decisions as controversial. Thirdly, he points out that educators see themselves as having few rights and students as having so many.[16]

Faculty and administrators in public higher education must change the self-concept that Schimmel suggests that they have, i.e., that they have few legal rights. Schimmel's findings reiterated the need for this research, since an understanding of the law of contract transmits to the faculty and administrators an understanding of their inherent rights, thus fulfilling their own need for security. The end result will be that this self-concept will change.

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[15] Ibid.

[16] Ibid., p. 273.

Fischer and Schimmel in their text, Civil Rights of Teachers, indicate that:

> It is paradoxical that in schools, which have as one of their major purposes preparation of citizens for effective participation in a democracy, civil rights have never been consistently applied.
>
> One reason for this inconsistency is that teachers are generally unaware of their rights. A recent survey in Massachusetts, for example, indicated that the law gives teachers a much wider range of freedom of speech and action than most teachers realize. Some even believe that they voluntarily give up many of their rights when they sign their teaching contracts.[17]

Fischer and Schimmel have concentrated on the civil rights of teachers. These rights emanate from the constitutional law vis-à-vis the law of contract. Therefore, their findings do not directly contribute to this investigation.

In pursuing the justification for this study, the researcher found that many of the grievances filed on faculty contracts were based on violation of the terms of the employment contract with which administrative personnel were not familiar. Specific terms with bilateral rights (management and labor) in a contract directly affect the management of any institution of higher education. Following the reasoning of Fischer and Schimmel, when

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[17]Louis Fischer and David Schimmel, The Civil Rights of Teachers (New York: Harper and Row, 1973), p. xi.

faculty become aware of their contract rights, civil rights in education will be more consistently applied. The strength of an institution will be reinforced by increased knowledge of faculty and administrative personnel in relation to the law of contract. The ability to respond and to account is in direct ratio to the level of understanding.

"Governments are instituted among men, deriving their just powers from the consent of the governed." This statement in the Declaration of Independence is predicated upon the conviction that "all men are created equal." From this belief, it follows that each person has the right to live his life according to his own philosophy and has a right to an equal voice in decisions which affect the whole community. These principles of consent and political equality facilitate the conception of democracy as a system which embodies the ideal of equality and political power among all members of the community.[18] This equality of power recognizes the dignity of the person and provides him with the opportunity to develop his powers and personality while advancing his own interests. The law of contract is a medium for the maintenance of the equality of power.

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[18]Peter Bachrach, The Theory of Democratic Elitism: A Critique (Boston: Little, Brown and Company), p. 83.

Rule by law is one of the crucial meanings of America. Our constitutional tradition created a political system for us that preserves human liberties and at the same time permits us to respond to changes in our conditions. One of the most sacred rights granted to us by our forefathers in the Constitution is the right to discuss our law. The problem arises in these United States that the issue is not the right to do but the failure to know how to so do.

Jethro K. Liberman indicates:

> Perhaps the most encouraging by-product of the constitutional crises that Richard Nixon threatened to provoke was the reawakening talk about constitutional law--not merely in the law schools but at the dinner tables and in the streets.[19]

Liberman goes on to say:

> But there is much more to be done. Aside from the lawyers themselves, who constitute something less than one-fifth of one percent of the population, the American public is schooled in law only when one of its members needs to write a will, buy a house, recover from an automobile accident, sue a doctor, or separate from a spouse. This is not sustained, sophisticated, or sensible education.[20]

William W. Van Alstyne, Professor of Law at Duke University's School of Law, has written on academic freedom and other aspects of constitutional law. He is the former

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[19]Jethro K. Liberman, Milestones! 200 Years of American Law: Milestones in Our Legal History (Minnesota: West Publishing Co.), p. xvii.

[20]Ibid.

General Counsel to the American Association of University Professors. In his article, "The Rights of Teachers and Professors," he indicates that the protection and implementation of the substantive law in education will cut down on the recourse of educators to the procedural aspects of the law. Knowledge of the substantive law of contract will assist faculty and administrative personnel in avoiding the inconvenience and stigma of the litigation process that Van Alstyne relates to by fortifying them with the tool to use the constitutional pre-termination procedural due process to their advantage, thus negating the need to go on to court litigation.[21]

Justice Frankfurter said, "The history of liberty has largely been the history of observance of procedural safeguards."[22] Frankfurter's point is well taken in education.

> Suppose, for instance, that a public school teacher on annual contract simply fails to receive any notice that his teaching contract is being renewed for the coming year. Or suppose that an assistant professor in a state college receives notice that his three-year contract is not being renewed and, upon inquiry to learn the reason, is advised that it is contrary to institutional practice to provide a statement of reasons. Or suppose that a full professor in a state whose legislature has neither adopted a tenure system nor even delegated authority to the state regents to provide for one receives notice in midyear that his service

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[21] Ibid., Van Alstyne.

[22] McNabb v. United States, 318 U.S. 332 (1943).

> will terminate the following June. In each case, the teacher may believe that one of the reasons significantly contributing to his termination involves a standard forbidden by the Bill of Rights--possibly retaliation for a protected extra-mural utterance, a disfavord political affiliation, or something similar.[23]

Here it is interesting to point out that fear is an emotion arising from the unknown. How many teachers would be afraid to question the reasons--not to mention the justification--for the above mentioned actions? The procedural safeguards to the substantive rights of the faculty are embedded in the history of liberty that Frankfurter speaks to.

Law of Contract

A review of case law serves as a good foundation to assist the reader in understanding the need to undertake this study. Alexis de Tocqueville in Democracy in America said, "There is hardly a political question in the United States which does not sooner or later turn into a judicial one." In the United States, the law permeates the whole. Frankfurter stated, "The law touches every concern of man, nothing that is human is alienated to it." Transferring the words of Frankfurter to the activities of daily living, we conclude that the law affects our lives personally and

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[23]Ibid., Van Alstyne.

and professionally from the proverbial "cradle to the grave." The law is concerned with the conditions of one's conception, legitimate or illegitimate, and one's intrauterine life. The interruption and/or continuance of intrauterine life is a legal matter today. Following birth and during the process of life, the law concerns itself with our health, education, and welfare. Finally, the circumstances of our death and disposition of our material assets concern the law. The purpose of the law is to protect its citizens. Educators as citizens should be aware of the implications of the law as it affects one's rights, the rights of others, and one's profession.

This charge is more relevant to educators today than ever before because the only way that the law will lose its face in a democracy is when the people themselves have no understanding of it. We are living in an age in which more and more educational issues are being resolved in the courts. The courts have in essence become an important factor in shaping policies in higher education.

In order to understand the effect of the concept of "legalism" as it exists today, the researcher studied the historical development of the law of contract. This investigation assisted the researcher in understanding the how and why of the "legalism" of today's society and its educational movements in the courts.

Historically, English law (which came aboard the first English ships to reach the American coast in 1606) was the cornerstone of American jurisprudence. English law was not, however, implemented per se in America. Historical differences in the founding of the colonies affected the law.

In Massachusetts, and the other colonies, where the Puritans dominated the political structure, the role of the church in politics took precedence. So too in the crown colonies the law was not the same as law in the states that began as proprietary colonies. The common law tradition was one of the significant factors in the resentment and alienation that led to the breach with England. The Anglo-American system of law attempts to achieve flexibility by using precedents that arise from changing conditions in society, thereby following the old adage that the law should be a guidepost not a hitching post. Our system of law makes provisions for dealing with problems as they arise. One of its greatest advantages is that by examining the principles that are derived from past experience, one can foresee with considerable accuracy the places where difficulties are likely to occur.

Operational guidelines are set forth by the Constitution for educators both substantively and procedurally. Substantively, the Constitution has provided for the adoption

of effective, valid rules and regulations. Procedurally, it has handled disciplinary actions concerning faculty, employees and students. Case law has repeatedly demonstrated that procedural problems would not have come before the court if more attention had been paid to the substantive law.

Landmark Cases

One of the major cases contributing to the development of the American common law system in the Supreme Court was the Trustees of Dartmouth College v. Woodward (1819): The Sanctity of Contracts. Through this case, the basic concepts of contract law contributed to bringing the American system of the law to life.[24]

In 1974 members of the American Bar Association were invited by the West Publishing Company to vote on what they as individuals believed to be the major milestone cases in the first two hundred years of law in the United States. The purpose of the survey vote was to organize the major identified cases into a commemorative text in celebration of the United States Bicentennial and the one hundredth year of the West Publishing Company as a law book publisher. The eighteen cases which received the highest number of votes

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[24]Trustees of Darmouth College v. Woodward, 4 Wheaton 518 (1819).

in the balloting were compiled into the commemorative volume.[25] What is significant to this study is the fact that the Dartmouth College case, a contract case, ranked eighth in importance by rank order in the national poll. The Dartmouth College case in 1819 set the stage for the development of the private corporation.

A series of early nineteenth century cases decided the Sanctity of Contracts. Nine years before the Dartmouth College case in 1810, Fletcher v. Peck held the inviolability of contracts. In this decision, the Supreme Court held that the original grant of land was a contract. The purchasers, in good faith, were entitled to keep what they paid for. Fletcher v. Peck is a significant case not only for contract law but it was the first time that a court struck down a state law as being unconstitutional.[26]

> Facts: Fletcher conveyed land to Peck. The deed contained a covenant that the title had not been impaired by any later act of Georgia.
>
> In a suit on the covenant, it was alleged that, because of undue means practiced on members of the legislature which made the grant, a subsequent legislature had passed another statute which annulled and rescinded the Act by which the original grant had been made, and reasserting title to the land on behalf of the State. Defendant pleaded that he and all the intermediate holders after the first grantors were purchasers without notice. Judgment was given for the Defendant.

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[25] Ibid., Liberman.

[26] Fletcher v. Peck, 6 Cranch 87 (1810).

Issue: Does this case come within the Constitution of the United States which declares that no state shall pass any bill of attainder, ex post facto law or laws in pairing the obligation of contract?

Decision: Yes.

Reasoning: (1) A contract is a promise between two or more parties, and it is either executory or executed. An executory contract is one in which a party binds himself to do a particular thing. This was the law under which the conveyance was made by the governor. A contract executed is one in which the object of a contract is performed. Blackstone says this differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. An executed contract, as well as one which is executory, contains obligations binding on the parties. A grant in its own nature amounts to an extinguishment of the right of the grantor. It implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. (2) A grant is an executed contract, the obligation of which continues. Since the constitution used the general term contract, without distinguishing between those which are executing and those which are executed, it must be construed to comprehend the latter as well as the former. A law which annuls conveyances between individuals, and declares that the grantors should stand of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected. (3) The estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises purchased could be constitutionally and legally impaired and rendered null and void.

In 1812, the second Supreme Court contract case was New Jersey v. Wilson. In this case, Chief Justice Marshall

voided a state tax on the land as an impairment of the new owner's contract right.[27]

Facts: Under an arrangement embodied in an Act of the New Jersey Colonial Legislature in 1758, for the settlement of claims by a tribe of Delaware Indians, it was agreed that certain lands shall not hereafter be subject to any tax. An Act of the New Jersey State Legislature repealed the exemption in 1804. Taxes were levied on the lands.

Issue: (1) Did a contract exist?
(2) If a contract existed, is it violated by the Act of 1804?

Decision: (1) Yes.
(2) No. Act of 1804 is invalid as a violation of the contract clause.

Reasoning: All requisites to the formation of a contract are found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect is made, the terms stipulated, the consideration agreed upon (which is a tract of land with the privilege of exemption from taxation); and then in consideration of the arrangement previously made, one of which this Act of Assembly is stated to be, the Indians execute their deed of cession. This is a contract clothed in forms of unusual solemnity.

The Dartmouth College case in 1819 set the stage for the development of the private corporation.[28]

Facts: By a royal charter issued in 1769, corporate powers and privileges were granted to the "Trustees of Dartmouth College," authorizing the trustees to fill all vacancies in their own body. By a statute of 1816, the State of New Hampshire undertook to increase the

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[27] New Jersey v. Wilson, 7 Cranch 164 (1812).

[28] Trustees of Dartmouth College v. Woodward.

number of trustees and to give the appointment of the additional members to the Executive of the State, and to create a Board of Overseers, with powers to inspect and control the most important acts of the trustees. The trustees refused to accept the provisions of this act, and brought this action in order to recover the corporate seal and other articles and records of the corporation which were in the possession of persons holding under the Act of 1816. A special verdict for the defendant was conditioned upon the validity of the Act of 1816. On this verdict, the Supreme Court of New Hampshire gave judgments for the Defendant.

Issues: (1) Is this contract protected by the Constitution of the United States?
(2) Is it impaired by the acts under which the Defendants hold?

Decision: (1) Yes.
(2) No. Judgment for Plaintiff.

Reasoning: (1) This is a contract to which the donors, the trustees, and the crown (to whose rights and obligations New Hampshire succeeds) were original parties. It is a contract made on valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which a real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution, and within its spirit also, unless the facts that the property is invested by the donors in trustee, for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the object remains the same, shall create a particular exemption which takes this case out of the prohibition contained in the Constitution. (2) Although a particular and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by the rules, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the Convention when the Article was framed, nor of the American people when it was adopted. It is necessary to go further, and to say that had this particular case been suggested, the language would have been varied as to exclude it, or it would have been made a special exception. The case, being within the words

> of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception. (3) The crown was bound by this contract and could have made no violent alteration in its essential terms, without impairing its obligation. (4) In this case, the will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted not merely for the perpetual application of the funds which they gave to the object for which those funds were given, they also contracted to secure that application by the Constitution of the corporation. They contracted for a system which should retain forever the government of the literary institution they had formed in the hands of persons approved by themselves. This system is totally changed. The Charter of 1769 exists no longer. It is reorganized, and reorganized in such a manner as to convert a literary institution, molded according to the will of its founders, and under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of literature in general. It is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given.

The year 1819 saw three cases of constitutional significance. Sturges v. Crowinshield held that a state bankruptcy law that discharged debtors who had contracted their debts before the law was passed was an unconstitutional impairment of the contract between the debtor and the creditor.[29]

> Facts: Plaintiff is a payee on two promissory notes. Defendant, who is maker of the notes, pleaded that he was discharged of his obligation under a New York bankruptcy statute which was enacted after the notes were made. Plaintiff contends: (1) that New York had no power to pass bankruptcy laws; and (2) this New York statute impairs the obligation of control.

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[29] Sturges v. Crowinshield, 4 Wheaton 122 (1819).

Issue: Is the statute invalid as applied to contracts in existence when it was passed?

Decision: Yes.

Reasoning: Chief Justice Marshall, delivering the opinion of the court said:

> What is the obligation of a contract? And what will impair it? . . . The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar, the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day, and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it . . . The plain and simple declaration, that no State shall pass any law impairing the obligation of contracts, include insolvent laws and all other laws, so far as they infringe the principle (the inviolability of contracts) the Convention intended to hold sacred, and no farther . . . the distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may be certainly modified as the wisdom of the nation may direct.
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> Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment in no part of the contract, and simply to release the prisoner does not impair its obligations.

McCulloch v. Maryland declared the power and supremacy of the federal government at a time in which the historical question was: What was the extent to which our federal

government could act and dominate the states?[30] America at this time was divided into two camps: (1) Supporters of a political group that supported the adoption by the state of the Constitution; and (2) supporters of a political group that favored a state in which there was a government of the people.

Facts: An action in debt by the Defendant in error. A branch of the Bank of the United States, established under an Act of Congress, was doing business in Maryland, without the authority of the state. McCulloch was a cashier in the bank. He issued notes on behalf of the bank without complying with the requirements of a Maryland statute which governed the issuing of notes, fees for same and penalties if fees not paid.

Issues: (1) Does Congress have the Constitutional power to incorporate the Bank of the United States? (2) May the bank and its branches claim to be exempt from the ordinary and equal taxation of assessed property of the states in which they are located?

Decision: (1) Yes.
(2) Yes.

Reasoning: (1) In addressing the issue, does Congress have the Constitutional power to incorporate the Bank of the United States, the court indicated that the conflicting powers of the general and state governments must be brought to light and their respective supremacy, when they are in opposition, must be settled. It then declared the power and supremacy of the federal government:

> If any one proposition could command the universal assent of mankind, we might expect that it would be this--that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all; and acts for all. Though any one state may be willing to control its operations, no

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[30]McCulloch v. Maryland, 4 Wheaton 316 (1819).

> state is willing to allow others to control them. The nation, in those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it by saying, 'this Constitution,' and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land, and by requiring that members of the state legialture, and offices of the executive and judicial department of the state shall take the oath of fidelity to it.
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> The government of the United States, then, though limited in its powers, is supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land, and 'anything in the Constitution or laws of any state to the contrary notwithstanding.'
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> The court continued its reasoning and concluded by saying: 'The act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.'
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> (2) Using the basic premise that the Constitution, and the laws made in pursuance thereof are supreme, the court held that 'The states have no power by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the Constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequences of that supremacy which the Constitution has declared.'

Two out of three of these landmark cases, at a time in which the power and supremacy of the federal court was being tested, were contract cases.

The Dartmouth College case rested on the proposition that once a state gives a specific power to a private party, it cannot change its mind later. The Dartmouth College case still has validity today for Dartmouth College. It held that the grant of the corporate right was a contract. This

corporate grant was held to be property, and property, the court said, cannot be taken away from the rightful owner.[31]

From the Dartmouth College case on, the bulk of the Supreme Court decisions which involve the law of contract are relevant to the issue of the limitation under the "contract clause" upon actions by state legislatures in respect to pre-existing contracts.

With the advent of the "due process" provisions of the Constitution, issues also arose involving the "due process" clause in the economic field. Gelpcke v. City of Dubuque, in 1863, applied the contract clause to retroactive decisions of the courts.[32] However, despite this declaration and others, the contract clause does not apply to retroactive decisions by the courts.

Tidal Oil Co. v. Flanagan (1924) held that:

> It has been settled by a long line of decision that the provisions of Section 10, Article 1, of the Federal Constitution, protecting the obligation of contracts against state action is directed only against impairment by legislation and not by judgments of courts.[33]

The 1926 decision in Appleby v. City of New York clearly demonstrates the court's delineation of the law of

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[31] Trustees of Dartmouth College v. Woodward.

[32] Gelpcke v. City of Dubuque, 1 Wall 175 (1863).

[33] Tidal Oil Co. v. Flanagan, 263, U.S. 444 (1924).

contract in approaching the Constitutional issue.

> The questions we have to determine are, first, was there a contract, second, what was its proper construction, and thirdly, was its obligations impaired by subsequent legislation as enforced by the state court?[34]

In 1935, the Supreme Court treated the national fiscal power as it had treated the state regulatory power by reading a reservation of power into private contracts.

> Contracts, however, expressed cannot fetter the Constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.[35]

The finality of state court decrees was the basic issue in the Irving Trust Co. v. Day (1942). In this decision, the Supreme Court held:

> When this court is asked to invalidate a state statute on the grounds that it impairs the obligation of a contract, the existence of the contract and the nature and the extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the review of the state court.[36]

This decision, as do others, reiterates the fact that the scope of the review under the contract clause is broad.

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[34]Appleby v. City of New York, 271 U.S. 364 (1924).

[35]Norman v. Baltimore & Ohio R.R. Co., 294 U.S. 240 (1935).

[36]Irving Trust Co. v. Day, 314 U.S. 556 (1942).

Although the Constitution contains no express provision limiting the federal government's power to impair contractural obligations, the concept of "due process" contained in the 5th Admendment is flexible enough to provide such protection, as in the protection against the taking of property without just compensation contained in the 5th Amendment.

In 1978, legal literature relative to the law of contract may be divided into three categories: (1) primary sources; (2) search books/finding tools; and (3) secondary materials.

Primary sources of the law, by definition, are those recorded rules of human behavior which will be enforced by the state. They include: (1) statutes passed by the legislature; (2) decisions of the courts; (3) decrees and orders of executives; and (4) rules and regulations of administrative bodies. Federal and state statutes and appellate court decisions are the most important primary authorities. The primary sources of the law relevant to this study range in time from the first enactment of our law making bodies to the most recent decisions, statutes, and rulings. A current decision may be based on a precedent many generations old.

The Massachusetts General Laws and the Massachusetts Decisions served as the primary sources of the law for this

study. They are the keystone for the information and edify the methodology.

Seminal Works

The investigator has made reference to Simpson and Alperin, Summary of Basic Law, 2d ed., vol. 14, of the Massachusetts Practice Series. Dean Frank L. Simpson has been an outstanding researcher in Massachusetts law. His studies contribute directly to the substance and form of this research. The Restatement of the Law of Contract, Second, was utilized by the researcher. The Restatement is a secondary source of legal information. This work lacks legal authority in the legal sense but has a persuasive influence in the law making process, as it has been prepared and published during the last thirty years under the auspices of the American Law Institute. The Restatement, Second, contributes to the substance and form of this study.

Summary

An implicit hypothesis underlies this research undertaking, namely, that faculty and administrative personnel in public higher education need to know basic concepts of the law (on a quasi-legal basis), but the majority of them have not had formal educational preparation in the field of law. The scope of the study was delimited to the knowledge of basic concepts of one field of law, i.e., the

law of contracts. A comprehensive study of the literature and research projects indicates that this problem has been only treated peripherally. Only fifteen research projects which involve the law of contract existed at the time of the undertaking of this study. There was only one indirectly related project. The researcher found no evidence the substantive law of contract has been researched.

What, from a research point of view, is interesting to note is that issues of due process, tenure, grievance procedures in higher education, and collective bargaining are the other topics researched to date. These comprise a focus on the procedural aspects of the law rather than the substantive. The inherent core of the procedural issue is the substantive right which has not been adequately researched. Van Alstyne has indicated that the protection and implementation of the substantive law in education will cut down on the recourse of educators to the procedural aspects of the law.[37] Recourse to the procedure (i.e., litigation) involves monetary and psychological costs that public higher education can ill afford. Ergo, the focus of this research is on the substantive aspects of the law of contract, particularly with a view to determining the comparative frequency of litigations emanating from the substantive law of contract. The findings of such analysis

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[37] Ibid., Van Alstyne.

inform the quasi-legal training of higher education personnel.

CHAPTER III

DESIGN OF THE STUDY

Faculty, and in many instances, administrative personnel, have secured their employment and maintained their status under the individual employment contracts which in public higher education led traditionally to the statutorily based tenure system. Academic tenure has been challenged for various reasons since its inception in 1915. It was in this year that the American Association of University Professors was formed to protect the academic community from unfair and arbitrary practices. During its first year, the committee on Academic Freedom and Tenure of the American Association of University Professors was involved with eleven cases of alleged infringement of academic freedom. This traditional academic value (tenure) is still under attack. The intensity of the attack has increased with every year of its existence.

Two major responses appear to be arising in response to the attack on tenure. These responses tend to be inherent in rejoinder to the changing roles and relationships in higher education, namely: (1) faculty unionization and (2) substitution of term contracts for tenure commitments.

Irrespective of the alternative accepted, it is necessary for faculty and administrative personnel in public higher education to have a quasi-legal knowledge of the basic concepts of the law of contract in order to know their respective rights and responsibilities. Employment for faculty and the academic freedom so valued by education will inevitably continue to be in terms of a contract, be it individual or collective.

Institutions of public higher education cannot function effectively and safely without employees having a working knowledge of the law of contract or the legal structure of their employer. While professional legal counsel is available to institutions to oversee the legal aspects of major operational functions, there is often no such provision for avoiding or resolving minor disputes, which may be equated to hidden cancerous lesions that will cripple and can ultimately kill an institution.

Legal reporting systems have developed over the past decade to publish up-to-date volumes of legal decisions. These reporting services cover all aspects of the law from basic civil law to taxation. While information is voluminous, it is not readily accessible to faculty or administrative personnel with reference to a single specific topic, issue, or area of the law, not to mention a specific jurisdiction.

More significantly, little information is available as to how the law relates to the operation of institutions of public higher education and the contractual rights of administrators, faculty, and students within these institutions.

Preliminary investigation suggested that this information voids--or more precisely, the inaccessibility of legal information to laymen--is a root cause of the mounting incidence of unnecessary litigation in higher education, with a consequent toll in monetary and human cost. Acting on the premise that quasi-legal education of professionals in higher education is the most practicable intervention for the reduction of litigation, the researcher has undertaken a twofold investigation: first, to determine what aspects of the law of contract should be the focus of a program of quasi-legal education; second, to identify basic concepts of the law of contract.

Procedures Used

Once the researcher identified the goal and, subsequently, the purpose of this investigation, she explicitly defined the following objectives:

(1) to use current case law to present information on the ramification of contract law in the field of education;

(2) to trace the sources of the common law which form the basis of the law of contract in the Commonwealth;

(3) to report the statutory provisions of the Massachusetts law which relate to Higher Education in the Commonwealth and the contractual powers of its constituents, and

(4) to identify concepts from the law of contract as established by statutory and case law in the Commonwealth.

The overall approach the researcher decided upon to meet the established objectives is the utilization of conscious testimony (primary sources of the law) as the research data. Thus, school law research was the methodology of choice.

The rationale for this approach for the procedures to be used in collecting and treating the data is based on the fact that school law research is an application of the historical research methodology. The interpretation of legal problems involves an expertise that few graduate students in education possess.[38] The researcher's legal and educational background gave her the required expertise for this type of research.

The means and modes of action to meet the established objectives were:

(1) to thoroughly review and analyze the research in higher education in relation to the law of contract to date;

(2) to review and analyze literature in higher education in relation to the need for this study;

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[38] Ibid., Best, p. 111.

(3) to research the case law in relation to:

a. the historical development of the law of contract,
b. constitutional law as it affects the law of contract,
c. cases specifically relating to issues in higher education;

(4) to research the Massachusetts General Laws in relation to higher education and contract powers and analyze same;

(5) to research and analyze 100 cases in higher education which involve issues in the area of the law of contract;

(6) to synthesize concepts from the law of contract integrating the statutory powers in higher education;

(7) to organize data from #6 above for faculty and administrative personnel in public higher education.

Data Sources

Sources of data for the purpose of this research are the "conscious testimony" or the primary sources of the law. Primary sources of the law may be defined as those recorded rules of human behavior which will be enforced by the state. Primary sources of the law include: (1) the Constitution of the United States; (2) statutes passed by the legislature; (3) decisions of the courts; (4) executive orders and directives; (5) treatise; and (6) rules and regulations of administrative bodies. Within the primary sources of the law, the federal and state statutes and appellate court decisions

are the more important authorities of the law.

American law has a number of characteristics which should be recognized for its research significance. The law is:

(1) subject to constant change through new decisions (approximately 30,000 a year) and new statutes (approximately 10,000 a year) which require regular and prompt supplementation and updating;

(2) marked by a search for certainty and stability;

(3) derived from many governmental agencies (judicial, legislative, and executive) and from a variety of jurisdictions (federal, state, county, and local);

(4) composed of different components, i.e., relative authority (binding, persuasive or no legal force).

The primary sources of the law relevant to any problem may range from the first enactment of our law-making bodies to the most recent decisions, statutes, and rulings. Thus, the law may vary greatly in its range in time. A current decision may be based on a precedent which is many generations old (this precedent is repeatedly demonstrated in Chapter II). The primary sources of the law retain their legal effect until they are expressly overruled or repealed. Thus, in Chapter II, the sources of data for this study are focused on the constitutional law as it affects the law of contract and case and statutory law as primary data bases.

One hundred cases in higher education in which legal issues relate directly to the law of contract are analyzed (see Chapter IV) to: (1) determine the most frequently litigated areas of contract law, thereby identifying primary domains of needed quasi-legal training for the education profession; and (2) demonstrate the application of the law of contract to facts of the case. These cases, as previously indicated, uphold the common law precedent and demonstrate the concept that the primary sources of our law-making bodies relate to the most recent decisions, statutes, and rulings. The legal reasoning and basic legal concepts set forth in the three nineteenth century cases are commensurate with those of the present court's decisions in the seventy-eighth year of the twentieth century.

The body of the study (Chapter IV) uses as the primary source of data the Massachusetts General Laws, the Restatement of the Law of Contract, and the case law.

Method of Gathering Data

The methodology in relation to the review of the literature requires little comment, since it is synthesized in Chapter II. Though the review of the literature is delimited to the law of contract, the methodology utilized demonstrates that the literature of the American law is rich and varied and has a distinguished human story.

The primary sources of the law contain the rules of human behavior by which society is governed. The legal literature, as demonstrated in Chapter II, reflects the continual struggle for justice and order which is a part of the cultural heritage of men.

Diverse finding tools have been used by the author in researching the body of the law involved in this study. They are: (1) Digests of Decisions; (2) Advance Sheets; (3) Shepard's Citations: (4) Black's Law Dictionary; (5) Massachusetts General Laws and Massachusetts Laws, Annotated; (6) Restatement of the Law of Contract; (7) Phrase Books; (8) Looseleaf Services (U.S. Law Week and Supreme Court Bulletin); and (9) Indexes.

The process employed was an analysis of basic contract case law and a synthesis of it from the referenced cases. The data reported in Chapter IV are a triparte presentation: (1) briefing of 100 cases in higher education, and an analysis of them in relation to the area of the law of contract which is in issue; (2) citations of the Massachusetts General Laws which relate to the study; and (3) basic concepts of the law of contract.

C H A P T E R I V

PRESENTATION AND ANALYSIS OF DATA

Introduction

The body of this chapter is a triparte presentation: (1) briefing of 100 cases in higher education involving contract issues, and an analysis of them in relation to the area of the law of contract which is in issue to provide the data bases for determining the most frequently litigated areas of contract law, thereby identifying primary domains of needed quasi-legal training for the education profession; (2) citations of the Massachusetts General Laws which relate to the study; and (3) basic concepts of the law of contract.

Higher Education

The researcher investigated current litigation in the field of higher education which involved the law of contract. Word and phrases: (1) Colleges and Universities and (2) Contracts were cross-referenced. During this process, 100 cases were selected. The investigation was further restricted to cases decided in the 1966-1977 period. One hundred sampled cases involving the law of

contract and public higher education were analyzed to provide the data base for determinining the most frequently litigated areas of the law of contract, thereby identifying primary domains of needed quasi-legal training for the education profession. There was no logical way to justify inferences other than to brief selected cases sufficient in number to be a representative sample. These cases demonstrated typical contract litigation and served as a means of measuring different elements of contract law.

The analysis of the 100 cases in higher education which relate to higher education and the law of contract further confirms the need for this study, as well as demonstrating the application of the concepts of the law and contract to the facts in issue. These cases are categorized according to emanation of issues: (1) student, (2) faculty, and (3) institution. These cases include decisions from both the state and federal courts. State court decisions are primarily those from the appellate court which is usually termed the supreme court of the state. Since the supreme or appellate court is the highest court of the state, its decision carries more weight as precedent value. The delivery system of public higher education is an agency of state government, and therefore, must guarantee students their rights under the Constitution of the United States. In litigations involving higher

education, three Constitutional Amendments and three Federal Acts have been most frequently used by students and faculty. They are as follows:

Constitutional Amendments

First Amendment. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment. The right of the people to be secure in their person, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without the process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Federal Acts

Civil Rights Act of 1871 (42 U.S.C.A. 1983). Every person who, under cover of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Education Amendments Act of 1972--Title IX Prohibition of Sex Discrimination.

Section 901: (a) No person in the United States shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .

Educational Amendments of 1974 (20 USC 821)--The Family Educational Rights and Privacy Act of 1974.

Section 438(a)(1) No funds shall be made available under any applicable program to any state or local educational agency, any institution of higher education, any community college, any school, agency offering a preschool program, or any other educational institution which has a policy of denying, or which effectively prevents, the parents of students attending any school of such agency, or attending such institutions of higher education, community college, school, pre-school, or other educational institution, the right to inspect and review any and all official records, files and data directly related to their children, including all material that is incorporated into each student's cumulative folder, and intended for school use or to be available to parties outside the school or school system and specifically including, but not necessarily limited to, identifying data, academic work completed, level of achievement (grades, standardized achievement tests scores) attendance data, scores on standardized intelligence aptitude, and psychological tests, interest inventory results, health data, family background information, teacher or counselor rating and observations and verified reports of serious or recurrent behavioral patterns-------Each recipient shall establish appropriate procedures for the granting of a request by parents for access to their child's records within a reasonable period of time, but in no case more than forty-five days after the request has been made.

The Rehabilitation Act of 1973--Nondiscrimination on the Basis of Handicap

Section 504: No otherwise handicapped individual in the United States, as defined in Section 7(6), shall solely by reason of his handicap, be excluded from

> participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal assistance.

The Federal Court System

The federal courts include the District Courts, which are the main courts of original jurisdiction, the Courts of Appeals, to which cases are appealed from the District courts, special courts as the Custom Court and the Court of Claims and the United States Supreme Court. The United States Supreme Court is the highest court in the land.

Jurisdiction of the court varies according to the court. A decision of the United States District Court applies only to that district. A decision of the United States Supreme Court applies to the nation. The Judicial Circuits are as follows:

First: Massachusetts, New Hampshire, Puerto Rico, Rhode Island

Second: Connecticut, New York, Vermont

Third: Delaware, Pennsylvania, New Jersey, Virgin Islands

Fourth: Maryland, North Carolina South Carolina, Virginia, West Virginia

Fifth: Alabama, Canal Zone, Florida, Georgia, Louisiana, Mississippi

Sixth: Kentucky, Michigan, Ohio, Tennessee

Seventh: Illinois, Indiana, Wisconsin

Eighth: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota

Ninth: Alaska, Arizona, California, Idaho, Guam, Hawaii, Montana, Nebraska, Oregon, Washington

Tenth: Colorado, New Mexico, Oklahoma, Kansas, Utah, Wyoming

The District of Columbia is a separate Judicial Circuit.

Case Analysis

One hundred cases are presented by related areas in higher education to show the application of the law of contract to the issues in question.

Student Related

Various issues relative to the law of contract as applicable to students in higher education have been litigated since the nineteenth century in the United States.[39] Though this research is limited to the 1966-1977 period, respectively, the researcher points out the Middlebury

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[39] In the student, faculty and institution related categories, one 19th century case is briefed in each area to indicate that issues relative to the law of contract have been litigated well over a century in Higher Education.

College v. Chandler case which in 1844 was a contract case in higher education.[40]

Facts: Defendant was sent to plaintiff college when a minor by his father. Defendant's father supported him as well as communicated with the college's president during his first year at the college. Defendant's father died during his second year at the college. He was supported by funds from his father's estate. The college continued to allow the defendant to matriculate and now sues for accounts due.

Issue: Were the items charged in the plaintiff's account actually furnished upon the defendant's implied contract to pay?

Decision: No.

Reasoning: The court used the legal premises of the legal right of a minor to bind himself for necessaries in this case. It held:

> An infant may bind himself for necessaries. And the reason assigned was, that without this power he might be exposed to perish or want. But though this was the alleged ground on which the infant's obligation was placed, yet the law has never limited its definition of the term necessaries to those things which are strictly essential to the support of life, ---as food, clothing, and medicine in sickness. The practical meaning of the term has always been in some measure relative, having references as well to what may be called the conventional necessities of others in the same walks of life with the infant, as to his own pecuniary condition and other circumstances. Hence, a good common school education, at the least, is now fully recognized as one of the necessaries for an infant.

The court then reasoned to the need of an infant for higher education and held:

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[40]Middlebury College v. Chandler, 16 Vermont 686 (1844).

> Now it does not appear that extraneous circumstances existed in the defendant's case, such as wealth or station in society, or that he exhibited peculiar indications of genius or talent, which education for him, more than for the generality of youth in community. And we, therefore, consider that such an education should not be ranked among those necessities, for which he could, as an infant, render himself absolutely liable by contract.

The contractual theory is the most prevalent and readily accepted relationship which is held to exist between the student and the institution. This theory holds that the student agrees to abide by the rules and regulations, and standards established and published by the institution. In return, the institutions will offer a degree to those who met the established standards. In Green v. Howard University, the court held that statements in a catalog of a private institution constitute a contract and, therefore, relieves the institutions of affording students with "due process," specifically notice and hearing.[41]

> Facts: Howard University was a private institution, party supported by federal funds. In its catalog, Howard University stated that the University reserved the right to deny admission to and to require withdrawal of any student at any time for any reason deemed sufficient to the University. Students conceded this right to the University.
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> When the head of the Selective Service System of the United States was invited to speak at the University, students caused a disturbance. The students who participated in the disturbance were sent formal

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[41]Green v. Howard University, 271 F. Supp. 609 (1967).

letters informing them that they would not be permitted to return to the University for the subsequent academic year. The University acted without giving the students the opportunity of notice and hearing.

Issue: Do statements in a private university catalog constitute a contract which therefore relieves the institution of the need to afford students with "due process," specifically notice and hearing?

Decision: Yes.

Reasoning: The procedural safeguards and the privileges accorded by the Constitution of the United States are confined to judicial and quasi-judicial proceedings whether in the court or before administrative agencies. These safeguards are directed solely against governmental action.

Jones v. Vassar College, in 1969, upheld the right of the private college to govern itself in any manner it may choose so long as there is an absence of arbitrary or capricious action. In this case, the court held that a drastic change in the rules and regulations by a private college did not constitute a breach of an implied contract with a student or his parents.[42]

Facts: Students at Vassar College, through their elected representatives, had the responsibility for enacting and enforcing undergraduate social regulations. This responsibility was derived from the Constitution of the Vassar College Student Government Association. The Student Government enacted new rules which allowed the female students who lived in each corridor of the residential halls to decide whether or not they wished limitations to be placed on the hours during which they might entertain male guests in their rooms. The president of Vassar College had the power to veto. He did not exercise it over this student enacted legislation. He therefore gave approval to the change in these rules and regulations.

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[42] Jones v. Vassar College, 299 N.Y.S. 2d 243 (1969).

The plaintiff is the mother of one of the female students who claims that the new rules constituted a breach of implied contract.

Issue: Does a drastic change in a private college's social rules and regulations constitute a breach of an implied contract with the student or his parents?

Decision: No.

Reasoning: Private colleges and universities are governed on the principle of academic self regulation which is free from judicial restraints. Mere speculations as to the projected hypothetical consequences of conduct complained of is insufficient for judicial interference.

Krawez v. Stans was a case involving Midshipmen at the Merchant Marine Academy.[43] It held that an offer made by authorized agents of a public institution of higher education, and the acceptance of that offer by students, constitutes a binding contract between the institution and the students. (Re: Chapter 1 for Case Brief.) This case clearly pointed out that there is and can be contracted relationships between public institutions and students.

The receipt of state funds by a private institution of higher education from a contract with the state calling for the operation of various programs or courses of study does not involve that institution in a "state action" subject to the provisions of the Federal Civil Rights Act was the decision in Powe v. Miles.[44]

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[43] Krawez v. Stans, 306 F. Supp. 1230 (1969).

[44] Powe v. Miles, 407 2d 73 (1968).

Facts: Alfred University in New York is a private institution. Alfred University students held a demonstration during an R.O.T.C. drill ceremony which caused disruption and alteration of the ceremony. The demonstrators were suspended for one semester following "due process" procedures as established by Alfred University. The students now sue seeking relief in court. They allege that the Ceramics College operated by the university under a contract with New York State was sufficient to make the university an instrument of the state for the purpose of the Federal Civil Rights Act.

Issue: Does the receipt of state funds by a private institution form a contract with the state which calls for the operation of a College of Ceramics involve the institution in a "state action" subject to the provisions of the Federal Civil Rights Act?

Decision: The court held no with the exception of the College of Ceramics.

Reasoning: There is no evidence of the slightest contract between the State of New York and the specific action taken against the students. If state financial aid alone were the test, construction and many other enterprises with extensive contracts with the state would be charged with 'state action.' The Court of Appeals upheld the lower court but with the exception of the College of Ceramics. It reasoned: The very name New York State College of Ceramics at Alfred University identifies the college as a state institution. Thus, students enrolled in the College of Ceramics can regard themselves as receiving public education and are entitled to be treated by those in charge in the same way as their counterparts in other portions of the state university. Therefore, action against students in the College of Ceramics constitutes state action.

A medical student sued the University of Miami and raised the issue: can a private college or university specify the terms under which it will graduate students? In the University of Miami v. Militana, the courts held in the affirmative in regard to this issue by stipulating that

promotion from one class to another is clearly within the discretion of the faculty's promotion committee.[45] It further held that the terms and conditions for graduation are offered by the publication of the college at the times of the enrollment of the students. These terms and conditions have some of the characteristics of a contract.

> Facts: A University of Miami medical student was promoted to the fourth year of study on probation, subject to a satisfactory work and re-examination in two subject areas. The student was dismissed for academic failure as he did not complete work in one of the subject areas. Conditions for promotions were outlined in the university's catalog. The student sues to require the university to promote him. The student won in the lower court and the university now appeals the judgment.
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> Issue: May a private college or university determine the terms under which it will graduate a student?
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> Decision: Yes.
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> Reasoning: The court held that the terms and conditions for graduation are spelled out by the publications of the college at the time of enrollment and have some of the characteristics of a contract. It said: ' . . . promotion from one class to another is clearly within the discretion of the faculty (Promotions Committee).'

An interesting application of contract law was made in Healy v. Larson.[46] This case has relevance to all Student Service Departments of institutions of higher education.

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[45] University of Miami v. Militana, 184 So. 2d 701 (1966).

[46] Healy v. Larson, 323 N.Y.S. 2d 625 (1971).

Facts: A prospective student consulted with the Dean, Director of Admissions, Acting President, Guidance Counselor and Chairman of the Mathematics Department about his proposed course of study, prior to his enrollment in Schenectady Community College. When the student applied for graduation, he was denied clearance as he had failed to take the proper credits within the area of concentration leading to his degree. He claimed that he had completed all of the courses which he was advised to take.

Issue: May a student be denied his degree because he failed to take the proper credits within his area of concentration if he has successfully completed all requirements that were outlined to him by the proper officials in prior consultations?

Decision: No.

Reasoning: There is an implied contract between the college and the student that if the student complies with the terms set forth by the college for graduation, he will obtain the degree sought. The court further indicated that additional requirements may not be placed on him by proper officials. In this case, the court pointed out that the contract theory is valid in private colleges and there is no reason why it should not also apply to public institutions of higher education as well.

Begley v. The Corporation of Mercer University was an action in contract for breach of contract.[47] It was an athletic bound case.

Facts: Mercer University, a private institution, signed a high school basketball player, to a financial grant in aid. Prior to the signing of the contract, the assistant coach checked Begley's grade point averge. He found that Begley had a 2.9 predicted grade point average. The National Collegiate Athletic Association required a 1.6 grade point average of participating athletes. Mercer University belonged to the National Collegiate Athletic Association. Several

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[47]Begley v. The Corporation of Mercer University, 367 F. Supp. 908 (1973).

months after the signing of the student financial grant in aid contract, officials of Mercer University learned that Begley's grade point average was graded on a 8.0 system, while the National Collegiate Athletic Association recognized 4.0. Mercer University repudiated the contract with Begley who sued for breach of the contract while seeking monetary damages.

Issue: Is an institution of higher education which voids an athletic scholarship contract, in light of new information, guilty of breach of contract?

Decision: No.

Reasoning: The assistant coach erred in assuming that Begley's grade point average was based on a 4.0 system. The terms of the contract clearly expressed the intent of the parties that a 1.6 grade point average was to be maintained in return for the scholarship aid. From the commencement of the contract, Begley was unable to comply with the relevant stated condition of a 1.6 grade point average. Therefore, he was unable to perform his part of the contract and he was not entitled to the performance of the contract by Mercer University.

In Mahavongsana v. Hall, plaintiff won a court judgment which ordered the Georgia State University to grant her a degree.[48]

Facts: The plaintiff was a graduate student in the Master's program at Georgia State University. She completed the required courses for her degree. She failed the comprehensive examination on two different occasions. The plaintiff, a citizen of Thailand, claimed that the examination became a requirement for the degree after she had enrolled in the program and, therefore, the requirement could not apply to her. She further held that the bulletins and catalogs of the university in effect at the time she enrolled as a student constituted a contract and that the defendant university should be ordered to grant her her degree. She also claimed violation of her due process rights.

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[48]Mahavongsana v. Hall, 401 F. Supp. 381 (1975).

The defendant held that the catalog had a reservation of right clause within the faculty to change or add to the standards of performance at any time.

Issue: Are due process rights of a graduate student violated if the student is required to pass a comprehensive examination, when the university catalog does not so state, and where the student received notice of the required examination only two weeks prior to the examination and six weeks prior to her completion of course work for the degree?

Decision: Yes.

Reasoning: The court held that the catalog and bulletin in effect at the time that the student enrolled did constitute a contract. The court ordered the defendant university to grant the degree because:

> In order to be properly prepared for the examination, plaintiff would have had to take other and further course work and that notice given was neither designed to inform plaintiff of the course work required nor did it permit plaintiff the time necessary to take such course work prior to the examination. Withholding the degree from plaintiff because of her failure to satisfy the examiniation requirement is, in the absence of adequate notice with respect to the scope and depth of the examination, a deprivation of a valuable property right without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article 1, Section 1, Paragraph 3, of the Constitution of the State of Georgia.

The University appealed this decision in Mahavongsana v. Hall, (529 F. 2d 448), United States Court of Appeals, Fifth Circuit, 1976.

Facts and Issue: Same as lower court.

Decision: No.

> Reasoning: Misconduct and the failure to attain the standards of scholarship cannot be equated. A hearing may be required to determine charges of misconduct. A hearing may be useless or harmful in finding out the truth concerning scholarship. There is a clear dichotomy between a student's due process rights in disciplinary dismissal versus an academic dismissal. The court pointed out that the plaintiff with ample notice was allowed to take the examination for the second time. She was also offered a special tailormade program. She was not treated arbitrarily or capriciously. She was not denied procedural or substantive due process. Implicit in the student's contract with the university upon matriculation is the agreement to comply with the university's rules and regulations, which the university is clearly entitled to modify so as to properly exercise its educational responsibility.

In the Civil Service Employees Association, Inc., v. State University of Stony Brook, the court held that a collective bargaining agreement between a union and a state university cannot be construed to deny a student organization the right to invite speakers from a rival union where the purpose of the meeting is other than organizing employees.[49] The court said:

> If the contract between C.S.E.A. and the state precludes the University from granting equal use of its facilities to outside organizations for purposes unrelated to union organization efforts, it is a fortiori discriminatory and cannot stand.

In an action in tort and contract, three contract issues arose in the Brown v. Wichita State University

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[49]Civil Service Employees Association, Inc. v. State University of Stony Brook, 368 N.Y.S. 2d 927 (1974).

case.[50] This case was a tort liability case but also gave rise to the following contract issues: (1) did the agreement between the Athletic Director and Golden Eagle constitute an enforceable contract binding the university, (2) did the plaintiffs have rights under the contract as third party beneficiaries, and (3) could the university claim sovereign immunity under Kansas statute?

> Facts: In the summer of 1970, the Athletic Director of Wichita State University entered into a contract in behalf of the university with Golden Eagle Aviation, Inc. to transport the football team to away games during the season. The aviation service was to provide a qualified flight crew under the terms of the agreement, and the university was to lease a Douglas DC 6-B from a third party as well as to provide liability insurance for the passengers as required by the federal regulations. The football team departed for the Utah State game in two Martin 404 planes. One of the planes crashed into a mountainside after an intermediate stop. It was later proven that the crashed plane was 2,900 pounds in excess of the allowed take-off weight. There was no written contract for the lease of planes. The university had not purchased the passenger liability insurance. The plaintiffs are either the survivors or the representatives of the deceased. They allege a tort action in negligence as well as a breach of implied and expressed warranty and strict liability. They also claim, as third party beneficiaries, the failure of the university to obtain the liability insurance. The defendant university held that the Athletic Director did not have the authority to bind the university. He only had the power to obligate the Physical Education Corporation and that the contract under question was between the Physical Education Corporation and the Golden Eagle Aviation Corporation. The university further held that the statute requiring the approval of the Board of Regents for

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[50] Brown v. Wichita State University, 540 P. 2d 66 (1975).

the university to enter into a contract renders the contract void and unenforceable. Sovereign immunity was also claimed by the university as to all tort claims.

Issue: 1. Did the agreement between the Athletic Director and Golden Eagle constitute an enforceable contract binding the university?
2. Did the plaintiffs have right under the contract as third party beneficiaries?
3. Could the university claim sovereign immunity under Kansas statues?

Decision: 1. Yes
2. Yes
3. No

Reasoning: The Physical Education Corporation was the agent of Wichita State and that Mr. Katzenmeyer, as an officer of the corporate agent, had the implied power and authority to bind the principal--Wichita State University. Wichita State is subject to liability for any negligent acts of its corporate agent. The Physical Education Corporation was a mere instrumentality of the university. The university cannot purposely delegate to a corporate entity, or otherwise, its responsibility for conducting intercollegiate athletic activities, directly control that corporate agent, and then disclaim any liability. The court said:

> The provisions of KSA 1974 Supp. 76-721 fix a method of procedure intended to secure order, system and dispatch in contracting with state educational institutions. Its provisions are directive, and as such, require implementing rules or regulations by the Board of Regents. No policy, rule or regulation by the Board of Regents has been cited or furnished to this Court regarding contract matters and none can be found in Kansas Administrative Regulations.*** However, absent any rules and regulations, Wichita State cannot use the statue to deny the validity of the Aviation Service Agreement following execution and partial performance. Common honesty forbids repudiation now.

Eden v. Board of Trustees of State University found that although the state is generally not subject to the same rules governing estoppel as an individual is in a situation which is justified by the facts and pertinent to prevent injustice, the doctrine of estoppel may be applied against the state, as in this case, from arguing its lack of capacity to contract with a student for his or her admission to an academic program.[51]

> Facts: The State University of New York at Stony Brook established a new School of Podiatric Medicine. Students were accepted for admission for the first class. The students were notified that they had to "suspend" their "plans to matriculate at Stony Brook in the coming academic year." The reason given was an alleged fiscal crisis. Students sue claiming that they had acquired a vested contractual right to be admitted to the entering class. The defendant university claimed that it acted in good faith due to a fiscal crisis.
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> Issue: May students under New York State law acquire a vested contractual right for admission to a school when they have received written acceptance for admission especially where there is inadequate evidence of a fiscal crisis to justify the abrogation of the contractual obligation?
>
> Decision: Yes.
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> Reasoning: There could be no doubt that the university's acceptance of the applications of the students satisfies the classic requirement of a contract. In the face of the existing contracts with petitioners, there was no rational basis for State's conclusion that saving money for future years justified the failing to open the school for the 1975-76 academic year. The evidence was undisputed that the deferment decision would not save money but would result in a

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[51] Eden v. Board of Trustees of State University, 374 N.Y.S. 2d 686 (1975).

monetary loss (the Federal Grant). The students' tuition fees and miscellaneous charges would add some income. If the students were not admitted, they will lose a year in furtherance of their chosen careers. They might lose their chance ever to be admitted to a School of Podiatry.

Miller v. Long Island University was a student housing case which turned on an issue of contract law.[52]

Facts: Long Island University, a private institution, informed two students that their housing contracts were being terminated. The university informed the students, one of whom was a paraplegic, to seek other housing accommodations. The university's housing contract has a clause which states that any violation of college regulations may result in termination of the contract. The students were notified that the university was taking action under this clause even though no formal charges were made against them. An appeal was made by the students to the university's president to no avail. The students sue claiming that they were never notified of the charges against them nor granted a hearing, thus their constitutional right to due process was violated both on a national and state basis. They also allege deprivation of "equal educational opportunities."

Issue: May a private university terminate a student's housing contract without notice and hearing to the students?

Decision: Yes.

Reasoning: Students in private institutions of higher learning are not clothed with the protections of the United States Constitution and amendments except when racial discrimination is practiced against them and probably where irrelevant standards of ethnic background or sex are used to exclude them from full participation in a university which benefits from state aid or tax exemption.

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[52] Miller v. Long Island University, 380 N.Y.S. 2d 917 (1976).

DeMarco v. University of Health Sciences held that a college may grant a degree to a student who has been arbitrarily dismissed for non-academic reasons and when on readmission, he achieved the academic requirements in effect at the time of his dismissal.[53]

Facts: Plaintiff on his application to the Chicago Medical School in 1941 indicated that he had never attended another medical school, when he in fact had been dismissed from a non-accredited medical college in Massachusetts. Plaintiff claims that he thought the question related to the issue of transfer credit. At the end of his third year at Chicago, he ranked 23 in a class of 58. He was within six weeks of completing his senior year when the medical college learned that he had attended another medical school and dismissed him. Officials of the Chicago Medical College discussed with him, prior to his dismissal, the fact that he was the only student who failed to make a contribution of $500.00 to the school.

Plaintiff attempted over the years to be re-admitted to the college. In 1968 or early 1969, he met with the college president who indicated the high cost of educating returning students. He pointed out that every returning student was expected to contribute to the college. Plaintiff agreed to contribute $40,000.00 and eventually paid $20,000.00 of that pledge. Plaintiff was readmitted in 1970 with the following stipulations: (1) he take specific course work and (2) take the National Board Examinations. Plaintiff failed Part 1 of the National Boards and then filed suit claiming that the National Board Examinations requirement was unfair. He alleges that he met the academic requirements of the 1941 Bulletin of the college which comprised his contract with the college. The lower court found for the plaintiff and ordered the college to grant his degree. The college appealed claiming that the court cannot mandate the awarding of an academic degree because this is a faculty prerogative.

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[53] DeMarco v. University of Health Sciences, 352 N.E. 2d 356 (1976).

Issue: May a court order the college to grant a degree to a student who had been arbitrarily dismissed for non-academic reasons and when on re-admission he achieved the academic requirements in effect at the time of his dismissal?

Decision: Yes.

Reasoning: Withholding a diploma conferring the degree of Doctor of Medicine is a unique injury. The courts will take cognizance of it. The 1941 contract provided for the issuance of a diploma at successful completion of the academic program as stated in the catalog. The evidence established the plaintiff earned the degree. It was proper for the court to order the mandatory injunction. The court went on to say:

> The 1970 requirement whereby the plaintiff was required to demonstrate current knowledge of medicine by passing Parts 1 and 2 of the National Boards was not responsive to the injustice done to him in 1944, when he was dismissed or in later years when he was denied re-admission, and reflects the inequitable use of power by the school. The extra requirement of demonstrating current medical knowledge was arbitrary and unreasonable, in light of the fact that the examinations have never been required for a degree then or now. It is recognized a school is entitled to enter into a special degree program with a student with whom there has been no previous history of bad faith; however, in this case the school admittedly acted in bad faith as stated by Dean Levitt.

A 1976 Supreme Court case dealt with the issue of racial discrimination in the making and enforcement of a private contract.[54]

Facts: The parents of Michael McCrary and Conlin Gonzales were unable to enroll their respective children in programs offered by two private schools in the State of Virginia. The children were denied

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[54]Runyon v. McCrary, 96 S. Ct. 2586 (1976).

admission because they were black. Both schools advertised by mail and the telephone directly. The plaintiffs responded to these advertisements. Neither school had accepted a black student for any of its program. Plaintiffs (children through their parents) filed a class action alleging that they were prevented from enrolling in the school in violation of 42 U.S.C. Section 1981. The district court and the Court of Appeals held that 42 U.S.C. Sec. 1981 makes the schools' discriminatory admission policy illegal and enjoined the defendant and member schools of the Southern Independent School Associtions from discriminating against applicants for admission on the basis of race.

Issue: 1. Does 42 U.S.C. Sec. 1981 prohibit private commercially operated non-sectarian schools from denying admission to prospective students because they are black?
2. If yes, is it constitutionally valid?

Decision: 1. Yes
2. Yes

Reasoning: (1) The racial exclusion practiced by the Fairfax-Brewster School and Bobbe's Private School is a classic violation of 42 U.S.C. Sec. 1981. The parents of Conlin Gonzales and Michael McCrary sought to enter into a contractual relationship with Bobbe's Private School for educational services. Gonzales' parents sought to enter into a similar relationship with the Fairfax-Brewster School. Under these contractual relationships, the schools would have received payment for services rendered. The prospective students would have received instruction in return for those payments. The educational services of the Fairfax-Brewster School and Bobbe's Private School were advertised and offered to the general public. Neither school offered services on an equal basis to white and non-white students. (2) 42 U.S.C. Sec. 1981 is constitutionally valid. From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. It does not

follow that the practice of excluding racial minorities from such institutions is also protected by the same principle.

The acceptance by a private school of an admission application fee creates a contractual obligation on the part of the school to evaluate the credentials of the applicant according to the admission criteria published in the school's bulletin and brochure.[55]

Facts: Plaintiff was rejected applicant to Chicago Medical School (private institution). Plaintiff claims that the school did not evaluate his application and others according to the entrance criteria which was printed in the school's bulletin and brochure. He further claims:

> . . . The prospective students' familial relationship to members of the school's faculty and to members of its board of trustees, and the ability of the applicant or his family to pledge or make payments of large sums of money to the school

was a basis of criteria for admission. Steinberg holds that a contract was created between him and the school when the school accepted his $15.00 application fee. This contract was breached when the school claims that a contract did not come into being as the school's bulletin and brochure do not constitute offers.

Issue: Does the acceptance by a private school, such as Chicago Medical School, of an admission application fee create a contractual obligation on the part of the school to evaluate the credentials of the applicant according to the admission criteria published in the school's bulletin and brochure?

Decision: Yes.

Reasoning: On the basis of contract law, the court pointed out that the school's bulletin and brochure was an invitation to make an offer. The student's response was an offer and the school's retention

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[55] Steinberg v. Chicago Medical School, 354 N.E. 2d 586 (1976).

of the application fee was an acceptance of that offer. It reasoned:

> We believe that he and the school entered into an enforceable contract; that the school's obligation under the contract was stated in the school's bulletin in a definite manner and that by accepting his application fee--a valuable consideration--the school bound itself to fulfill its promises. Steinberg accepted the school's promises in good faith and he was entitled to have his application judged according to the school's stated criteria.

In the area of academic affairs, Lyons v. Salve Regina College held that various college documents, such as the college catalog and other publications which relate to procedures to be followed by a student in appealing grades and academic decisions constitute a valid contract between the college and the student.[56]

> Facts: Lyons (P) was a fourth year nursing student at Salve Regina College. She accompanied an ill friend via ambulance to Boston. Lyons therefore lost three classes and two clinical experiences. Lyons holds that an instructor assured her that the only result of her absence would be that she would receive a grade of "Incomplete" for the course. Lyons subsequently completed the course, took the examination. She received an F grade. She appealed the F grade according to the college's Academic Information and Registration Material for 1975 which provided for a Grade Appeals Committee consisting of a three-member Grade Appeals Committee whose recommendation would be made to the Dean of Students. Lyons had received almost all A's and B's in her courses. She was also President of her class. By a 2-1 vote the Appeals Committee recommended an "Incomplete" grade instead of an F to the Dean who overruled the Committee and denied her appeal. As a result of this decision, plaintiff Lyons was dropped from the School of Nursing but was allowed

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[56]Lyons v. Salve Regina College, 442 F. Supp. 1354 (1976).

to change her major. She has graduated from college with a degree in Psychology. Plaintiff claims that the Dean's decision constituted a breach of contract. Published college materials state, 'the recommendation of the (Appeal) Committee is made to the Dean of Students/Associate Dean of the College.' In the Dean's written guidelines it stated that the decision of the Committee was final.

Issue: 1. Do various college documents, such as the college catalog and other publications, which relate to procedures to be followed by a student in appealing grades and academic decisions constitute a valid contract between the college and the student?

2. In determining whether or not the terms of a college rule or regulation are ambiguous and/or to determine the intent of the parties in interpreting the underlying rule or regulation, may a court examine written procedures and/or memorandas of college administrators?

Decision: 1. Yes
2. Yes

Reasoning: (1) The written procedures and memorandum by the Dean intended that the Committee's decision would be final. The court indicated:

> . . . the college will not have fulfilled its contractual obligation to Lyons until it gives her the opportunity to meet its requirements for a nursing major.

(2) The defendant's action in refusing to abide by the deicsions of the Appeals Committee constituted a breach of contract. In making this finding, the court reasoned:

> the court is not, as defendants contend, arbitrarily imposing the legal technicalities of a commercial transaction upon what is essentially an academic dispute. Rather, the court is simply holding that the college, as another promissor must abide by procedures to which it has bound itself and its students, until such time as it seems fit to change those procedures. (This case is in hearing on appeal.)

A suit in higher education which involved students who borrowed funds under the guaranteed Student Loan Program and schools who administer financial aid programs was based on contract issues.[57]

Facts: Plaintiff, American Training Services, Inc., is a New Jersey corporation which is in the business of providing vocational training on a contract basis in several fields. Defendant is a Tennessee corporation. Plaintiff and defendant entered into a contract in which the defendant bank agreed to finance the tuition loans of plaintiff's students. Both plaintiff and defendant qualified for participation in the Federal Guaranteed Student Loan Program. In compliance with the Federal Guaranteed Student Loan Program, defendant paid plaintiff the proceeds of each loan that the defendant made to a student as payment for the student's tuition. Plaintiff was to periodically notify defendant of students' withdrawals. A pro-rated portion of the unused tuition was to be paid by the P to the D bank to be applied to the student's note. This refund was to accompany the notice of withdrawal. American Training Services (P) held that the bank was not handling the loans properly and filed an action in tort for negligence and in contract for breach and ceased sending the withdrawl refunds to the bank though it forwarded the notices of withdrawal. Defendant bank filed a counter suit against plaintiff for recovery of the refund payments. Plaintiff held that the withdrawals were caused by the defendant's negligence in handling loan applications and the refunds were the subject of a set-off against amounts due to plaintiff. Plaintiff also rejected the notion that the repayments were accrued to the students.

Issue: May the American Training Services (P) use the refunds for unused tuition as a set-off against the defendant?

Decision: No.

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[57] American Training Services, Inc. v. Commerce Union Bank, 415 F. Supp. 1101 (1976).

Reasoning: The refund of unused portions of tuition when a student withdraws are due and payable to the student. Any refund payments are legally owed to the student who has withdrawn and form the basis of a set-off against amounts claimed to be due to ATS by C.U.B. as a result of the latter's alleged negligence or breach of the contract.

Commonwealth v. Howell, 181 A. 2d 903 (1962).

Facts: Defendant appeals from an order of the Philadelphia County Court which required him to pay college tuition for his minor daughter from the proceeds of an insurance policy which he maintained for that purpose. Both appellant and his wife are college graduates. Appellant is a pharmacist and operates his own drug store. Appellant's daughter was born in 1943. In 1952, a child's educational endowment policy was issued to appellant by the North Carolina Mutual Life Insurance Company, to mature in ten years in principal sum of $1,500.00. Appellant concedes that this policy was designed "to send the child to college." On graduation from high school in 1961, the daughter expressed a desire to continue her education at Temple Community College. The policy's value was then in excess of $1,000.00. Originally, appellant's wife petitions the court for support. The lower court scheduled a hearing for September 21, 1961, which was limited to the issue of tuition. Judgment was given to wife. Appellant contends in this appeal that the ownership of this policy, even though coupled with the intention as the time of issuance to use the proceeds from it for the daughter's college education does not "amount to a valid and binding agreement or voluntary offer such as can be enforced by the court."

Issue: Is this insurance policy in question one which "amounts to a valid and binding agreement or voluntary offer such as can be enforced by the courts?"

Decision: Yes.

Reasoning: (1) A parent is not liable for the support of a child attending college in the absence of an express contract, and unless the circumstances warrant

it. On the other hand, where there is an agreement to support, which it is within the contemplation of the parties, a father may be liable to support and furnish his child with a college education. (2) The instant situation falls within the exception outlined by President Justice Rhodes in the Martin case. Although the educational insurance policy may not be an express agreement to support, its existence is clearly a circumstance which warrants the action of the court below. Order affirmed.

In Abrams v. New School for Social Research, the court affirmed that a doctoral candidate in psychology who had failed two oral examinations and who, pursuant to agreement with school, submitted to interviews with evaluators who rejected student's proposed dissertation and thus disqualified student from a third oral examination could not recover from school earnings while engaged in pursuit of degree or for alleged wrongful deprivation of opportunity to further pursue his studies.[58]

Facts: Doctoral candidate in psychology who was required to withdraw from school brought action for damages for earnings lost while engaged in pursuit of degree and for alleged wrongful deprivation of opportunity to further pursue his studies. The Supreme Court, New York County, George Postel, J., denied school's motion for summary judgment dismissing the complaint and school appealed. The Supreme Court, Appellate Division, 50 A.D. 2d. 778, 377 N.Y. S. 2d. 74, reversed and dismissed the complaint and student appealed. The Court of Appeals held that the record established that procedures employed by school to effectuate additional review procedure after the student had failed two oral examinations were in accordance with the school's agreement with the student.

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[58]Abrams v. New School for Social Research, 390 N.Y.S. 2d 818 (1976).

Issue: Was a contract breached?

Decision: No.

Reasoning: The institution had agreed to permit the plaintiff, a doctoral candidate in psychology who had failed two oral examinations, to take a third oral examination, provided that two of three social psychologists favorably reviewed his dissertation proposal. Plaintiff voluntarily submitted to separate interviews with two evaluators and both rejected his proposal after an independent review. Hence, plaintiff was required to withdraw from the institution. The record establishes that the procedures employed to effectuate this additional review procedure were in accordance with the institution's agreement with the plaintiff. The resolution of this case does not turn on any disputed issues of act and the Appellate Division properly directed the entry of a judgment dismissing plaintiff's complaint.

In Tanner v. Board of Trustees of University of Illinois, the court set forth the following rule of law:

> Although University of Illinois is under discretionary and not mandatory duty to issue degrees to persons participating in its curricula, it cannot act maliciously or in bad faith by a student who fulfills its degree requirements.[59]

Facts: A thesis committee composed of five professors from the department was formed to evaluate plaintiff's dissertation and to conduct comprehensive oral and written examinations of the plaintiff. In December 1972, plaintiff completed the written examinations submitted by two members of the committee and, in March 1973, he completed a written examination submitted by a third member of the committee. Although plaintiff completed his oral examination and submitted his dissertation to a committee member in August 1973, he was informed in December 1973 that he would have to be re-evaluated in a single, written examination, but that the university thereafter informed him that the

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[59] Tanner v. Board of Trustees of University of Illinois, 363 N.E. 2d 208 (1977).

examination would be in two parts, both oral and written. In June 1975, plaintiff was informed by George Russell, Vice Chancellor and Dean of the Graduate College, that the thesis committee, the examinations and dissertation submitted by plaintiff were all unacceptable because the committee was never formally recognized by the Graduate College, and that he would have to be re-evaluated. On July 25, 1975, plaintiff commenced his action in the Circuit Court of Cook County, seeking a writ of mandamus compelling the university to issue him a Ph.D. degree in Business Administration, or alternatively, $100,000.00 damages for breach of an implied contract to issue the degree. The university was granted a venue transfer to the Circuit Court for the Sixth Judicial Circuit, Champlain County, on September 29, 1975, and on February 13, 1976. That court dismissed the complaint, finding that no set of facts could be proved to support plaintiff's stated theories of mandamus and contract.

Issue: 1. Does an action of mandamus stand?
2. Does an action stand for damages on a theory of implied contract?

Decision: 1. Referred for repleading.
2. Needs to be filed in Court of Claims.

Reasoning: (1) Mandamus is an extraordinary remedy and should not be issued unless the plaintiff demonstrated a clear right to the writ and a clear obligation on the defendant to perform the act sought to be performed. Although we recognize that the university is under a discretionary and not a mandatory duty to issue degrees to persons participating in its curricula, the university may not act maliciously or in bad faith by arbitrarily and capriciously refusing to award a degree to a student who fulfills its degree requirements. The case is remanded to the trial court for repleading on plaintiff's mandamus theory. (2) Action for money damages against University of Illinois on theory of implied contract had to be filed in court of claims.

In Basch v. The George Washington University, a class action by students against the University, the court laid

the following procedures: (1) Whether given section of university bulletin becomes part of the contractual obligations between students and university depends upon general principles of contract construction, including principle that document must be viewed as a whole, but terms are to be given their common meaning, and principle that court should view language as would reasonable person in position of the parties.[60] (2) Viewed as a whole, the language of university bulletin at most expressed expectancy by the university regarding future tuition increases, and not any promises susceptible of enforcement.[61]

> Facts: Appellants represent a class of approximately 500 students attending the medical school in all four current classes. Prior to their acceptance of the university's offer to attend the medical school, each of these students received a copy of The George Washington University Bulletin: School of Medicine and Health Services. While the language of the bulletins received by each class varied somewhat, all of the parties agreed that those differences were insignificant, and that only the language on the 1974-1975 bulletin need be considered for purposes of this action. That bulletin specifically set the tuition rate for the 1974-1975 academic year at $3,200, but went on to state that:
>
> > Academic year tuition increases have been estimated as follows: 1975-76, $200; 1976-77, $200; 1977-78, $200; 1978-79, $200 . . . Every effort will be made to keep tuition increases within these limits. However, it is not possible to project future economic data with certainty, and circumstances may require an adjustment in this estimate.

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[60] Basch v. George Washington University, 370 A. 2d 1364 (1977).

[61] Basch v. George Washington University.

Appellants aver that their decision to attend the medical school was based, in part, in reliance on these estimates. Subsequently, on January 17, 1975, the university issued a Statement on Tuition Rates which provided:

> The Board of Trustees of the George Washington University has approved a tuition of $5000 per year (two semesters) for the fiscal year 1975-76 for all candidates for the degree of Doctor of Medicine in the School of Medicine and Health Sciences. This increase in tuition rate was necessitated by the anticipated impact of inflation and on the projection of a recently (mid-December) proposed decrease in the funding support provided by the District of Columbia Medical and Dental Manpower Act, a Federal Government program. The combination of the projected increase in expenses due to inflation and decrease in income totals approximately $900,000 and the increase of $1600 per student will yield an amount approximately equal to the projected gap. The operations of the School of Medicine and Health Sciences are planned to proceed on a no-growth basis; that is, there will be no increase in staffing or in other aspects of the School.

In addition, the Board of Trustees also approved a maximum tuition rate for the academic year of 1976-77 of $12,500 for each candidate for the degree of Doctor of Medicine. The exact amount, which will be set by the President of the University under authority granted him by the Trustees will be determined when the extent of the impact of cost increases and the anticipated loss of funding support from such federal programs as the Medical and Dental Manpower Act and the Health Professions Capitation Grant Program are determined. Continuation of current rates of inflation combined with the total loss of funding support from federal programs would necessitate the maximum $12,500 tuition rates for 1976-77. Both local and national efforts to provide financial support to students continue; and should efforts to secure funding support to the School prove fruitful, tuition will be set at the lowest feasible figure. On August 7, 1975, appellants initiated this action, arguing below that the new tuition rates were instituted in breach of their contracts with

the University's bulletin. They are renewing this contention on appeal.

Issue: Were there new tuition rates instituted in breach of the students' contracts with the University as evidenced by the projected increases in the University bulletin?

Decision: No.

Reasoning: (1) The mere fact that the bulletin contained language regarding a projected tuition increase is not enough to support a finding that the language amounted to a contractual obligation. In construing the terms of a contract, the document itself must be viewed as a whole. It has been noted that:

> In ascertaining intent, we consider not only the language used in the contract but also the circumstances surrounding the making of the contract, the motives of the parties and the purposes which they sought to accomplish.

(2) The terms of the document are to be given their common meaning.

> In arriving at that menaing. the court should view the language of the document as would a reasonable person in the position of the parties. Viewing the pertinent language as a whole, in the context of a University bulletin, we cannot conclude that a reasonable person would have assumed that the University intended to bind itself by the construction appellants urge on us.

Harris, Associate Judge, concurring:

> I concur in the affirmance. The statements in appellee's bulletin concerning future tuition increases were too hedged with qualifications to be considered promises which the University was obligated to perform. Appellants had no reasonable expectations which deserve protection.

Giles v. Howard University held that since the University's Medical School's student promotion policy

was not an integrated agreement, standard in interpreting it was that of reasonable expectation.[62]

Facts: Plaintiff enrolled in the Howard University College of Medicine in August 1973. He passed all his first semester classes except biochemistry, which he failed. The college permitted him to participate fully in the second semester program, provided he agreed to retake biochemistry in the Directed Study Program during the summer of 1974. He passed all his second semester courses but failed biochemistry. Plaintiff then received a letter from the Dean of the Medical College, Marion Mann, M.D., informing him that he would be allowed to continue as a medical student if he repeated biochemistry and retook and obtained satisfactory grades in the other courses in his curriculum that he had already passed. Dean Mann's letter also stated:

> Section IV of the Student Promotions Policy is applicable only to students who begin the academic year in good academic standing. The Committee hereby informs you that you are not in good academic standing but are on probation; and that if you fail any course during the first semester, you will be dropped from the College of Medicine.

Plaintiff repeated the courses and passed biochemistry, but failed anatomy. On March 7, 1975, he was dropped from the College of Medicine. He thereupon requested readmission. By letter of July 7, 1975, Dean Mann informed the plaintiff that his request for re-admission had been considered and that the committee considering the request would be reconvened if the plaintiff passed special National Board Examinations in anatomy, biochemistry, microbiology, and physiology. The plaintiff took these examinations and failed all four. No further action was taken on his request for readmission. Plaintiff sues alleging denial of fifth amendment procedural due process rights and a common law claim for a breach of contract or tort.

Issue: 1. Was plaintiff denied his fifth amendment procedural due process rights?
2. Does he have a common law claim for breach of contract?

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[62] Giles v. Howard University, 428 F. Supp. 603 (1977).

Decision: 1. No.
2. No.

Reasoning: (1) Howard University is not sufficiently involved with the federal government to make its actions equivalent to federal government actions and thus subject to the restraints of Fifth Amendment U.S.C.A. Const. Amend. 5. Only the federal government is subject to constitutional restraints of Fifth Amendment procedural due process. U.S.C.A. Const. Amend. 5.

(2) To state an actionable claim for breach of contract or tort because of refusal of university to readmit plaintiff to medical school, plaintiff must adduce evidence of a violated contractural right or improper motivation or irrational action on part of university. After reading the Student Promotions Policy, the reasonable expectation of any student is that if he fails a course and does not make up the deficiency in the Directed Study Program, he can be dismissed or can be retained upon compliance with any reasonable condition. This is the interpretation the Court gives the Student Promotions Policy. Under this interpretation, the plaintiff has failed to adduce any evidence of a violated contract right. He has also failed to present any facts to show improper motivation or irrational action on the part of the university or any of its officials. On the contrary, all the evidence indicates the university went out of its way to help the plaintiff remain in medical school without compromising its academic standards. It gave him at least three second chances. Under these circumstances, the facts necessary to sustain an actionable claim have not been shown.

In conclusion, twenty-two of the 100 cases were in the area of student related cases. In these twenty-two student related cases, five of the areas of contract were in issue (RE: Table 1, page 95). Issue in this category did not arise in relation to the area of Consideration, Fraud, Mistake and Duress or the Statute of Frauds. A graphic representation of the distribution of the percentage of

TABLE 1

ANALYSIS OF 22 STUDENT-RELATED CASES ACCORDING TO THE AREAS OF THE LAW OF CONTRACT IN ISSUE

Higher Education Selected Cases / Related Area	Law of Contract							
	Expressed or Implied	Offer and Accept	Consideration	Capacity	Fraud, Mistake, Duress	Illegality	Statute of Frauds	Performance and Breach
Student (22)	5	6	0	1	0	1	0	9

Source: 100 Cases.

student issues, in the 100 cases as briefed in this chapter to the area of the law of contract is found in Figure 1, page 97.

Faculty Related

Case law in relation to faculty and the law of contract may be divided into two categories: (1) personal and (2) operational. By the personal classification, the rights of the individual faculty person under his contract of employment including the issue of tenure are set forth, while the operational classification may be defined as the academic rights and freedom of the faculty person while functioning as an educator under his contract of employment. This research proved that as far back as 1893, students questioned in the courts the latter classification. The academic prerogative of faculty to make academic decisions, e.g., recommend candidates for a degree, was clearly set forth by the court in People v. New York Law School.[63]

> Facts: In 1892, the Dean of the school suggested that a committee be appointed to arrange for the commencement, secure a hall and engage a speaker. The committee was so appointed. By a majority vote, after much contention, they decided to invite a clergyman of one faith to offer the invocation and a clergyman of another faith the benediction. On June 2, the Dean indicated to the committee that this was a poor

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[63]People v. New York Law School, 22 N.Y.S. 663 (1893).

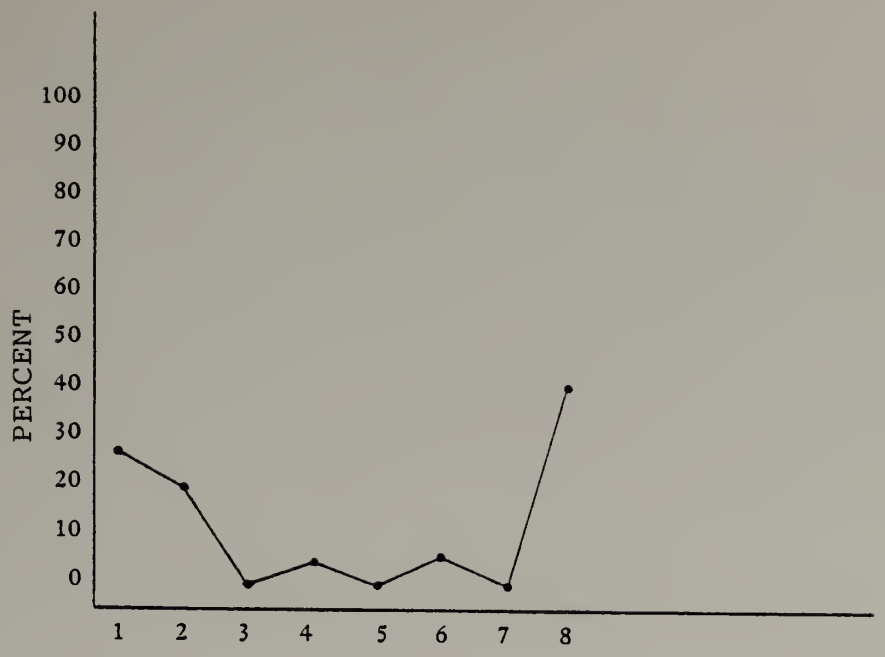

Figure 1. Distribution of the percentage of student issues in the 100 cases to the areas of the law of contract.

Legend:
1. Expressed or Implied
2. Offer and Acceptance
3. Consideration
4. Capacity
5. Fraud, Mistake, Duress
6. Illegality
7. Statute of Frauds
8. Performance and Breach

decision and suggested that they did not have religious participants. The committee accepted the Dean's suggestion. On June 3, the Dean was informed by telegram that Bishop Doane, one of the trustees, would confer the degrees. Because a church dignitary was to confer the degrees, the faculty determined that he should be asked to conduct the appropriate religious exercises. This determination was communicated to the committtee. On the same day, the relator and eight or ten others demonstrated against the action of the faculty. Mr. O'Sullivan charged the dean with underhanded conduct and the students, then present, threatened not to attend the commencement exercise unless the faculty action was reversed. On June 6, Mr. O'Sullivan had a meeting with the dean. The meeting as described by Mr. O'Sullivan is sufficient to say it justified the refusal of the faculty to recommend him as a student upon whom a degree should be conferred. The relator has admitted the truth of the answering allegations.

Issue: Did the conduct described justify the Dean's refusal to award the certificate to the relator?

Decision: Yes.

Reasoning: The court focused on the right of faculties to recommend candidates for degrees. It held:

> Assuming the relator's conduct is correctly stated by the Dean, as we must, it was, to say the least, contumacious and calculated to breed disorder and trouble in the school. That there should be some power vested in the faculties of schools and colleges to repress and punish such conduct will be conceded by all. It cannot be that a student having passed all examinations necessary for a degree can, before his graduation, excite disturbance and threaten injury to the school or college without being amenable to some punishment. No course would seem open to forthwith expel him or refuse his degree. In this case, the latter course was taken. The faculties of educational institutions having power to confer degrees, and the teachers of schools having the right to recommend to the Regents of the University, students deemed worthy of degrees, are necessarily vested with a broad discretion as

> to the persons who shall receive those honors or be recommended for such distinction; and when the conduct of a student has been such, intermediate his final examinations and the time of conferring degrees, that there is a fair occasion for the exercise of discretion on the part of the faculty, and there clearly was in this case, it should be reversed by this court, and the case must be an extraordinary one to justify judicial interference. The court further indicated that it saw no reason why the right to discipline is not as great between the final examination and the graduation.

Thus, in the nineteenth century, the court clearly upheld the right of faculty to make academic decisions. Case law presently, as later cases will validate, uphold the separation of the academic decision and the courts, when the faculty are not arbitrary or capricious in their judgment. The aforementioned case clearly indicated "the case must be an extraordinary one to justify judicial interference." It should be noted that, irrespective of the classification, faculty rights emanate from the contract. Therefore, the legal issue to be determined by the court is one relative to basic contract law.

In researching litigation in higher education relative to the law of contract and faculty and administrative personnel, the researcher found that faculty and administrative personnel related cases were voluminous. For this section of case reviews, the terms faculty and administrative personnel are used interchangeably. Thus, in the following

pages, selected cases (1966-1977) are briefed to present the pertinent research data.

The issue of probationary teachers was discussed in the Harvard Law Review:

> In deciding whether to rehire or grant tenure, the consideration involved goes well beyond a judgment about general teaching competencies. College professors are ordinarily specialists teaching particular courses. In seeking to mold a balanced department, the institution must take into account the particular contributions which each potential teacher will make to the department as a whole; for this purpose personal factors, such as the political or economic biases of the professor, may well be legitimate considerations. An attempt must also be made to evaluate the potential academic contributions of the new teacher, as well as his teaching ability. In addition, in many institutions the practice is to hire several probationary teachers in contemplation of filling our tenured positions. A decision not to rehire thus does not involve issues of 'proof' of the teacher's unsuitability; it involves rather a complex comparative and evaluative process. Although dismissal during the term of the contract must entitle the probationary teachers who are not rehired to a full hearing, to grant such a hearing to all probationary teachers who are not rehired would be both administratively too burdensome and practically useless, for the issues involved may not be suitable for ajudicatory.[64]

Numerous statutes and regulations entitle certain public employees to permanent job security, i.e., they can only be discharged for enumerated causes. For employees who have tenured status, these statutes create property interests within the meaning of the Fourteenth Amendment. Such employees cannot be deprived of this property interest

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[64] Harvard Law Review 1048, 1101 (1968).

without first having a hearing that satisfied due process hearing. This is the decision in Perry v. Sindermann.[65]

> Facts: Sindermann had been employed on a series of one year contracts in the Texas public higher education system for ten years. During his tenth year of teaching, he was given timely notice that his contract would not be renewed. Sindermann petitioned the federal court urging that he was entitled to a statement of reasons for his non-retention and a pre-termination hearing to contest those reasons. He alleged that while the public junior college where he had been employed had no provision 'in the college's official Faculty Guide' and on "guidelines promulgated by the formal tenure system, it had a de facto tenure program which was passed on a Coordinating Board of the Texas College and University System that provided that a person, like himself, who has been employed as a teacher in the state college and university system for seven years or more has some form of job tenure."
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> Issue: Does Sindermann have a right to a hearing?
>
> Decision: Yes, if he could prove his allegations.
>
> Reasoning: Though a subjective "expectancy" of tenure is not protected by procedural due process, respondent's allegation that the college had a de facto tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an opportunity of proving the legitimacy of his claim to job tenure. Such proof would obligate the college to afford him a requested hearing where he could be informed of the grounds for his non-retention and challenge their sufficiency.
>
> Mr. Chief Justice Burger, concurring:
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> > I concur in the Court's judgments and opinions in Sindermann and Roth, but there is one central point in both decisions that I would like to underscore since it may have been obscured in the comprehensive discussion of the cases. That point is that the relationship between a state institution and one of its teachers is essentially a matter of state concern and state law.

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[65]Perry v. Sindermann, 408 U.S. 600 (1972).

> The Court holds today only that a state employed teacher who has a right to re-employment under state law, arising from either an express or implied contract, has, in turn, a right guaranteed by the Fourteenth Amendment, to some form of prior administrative or academic hearing on the cause for non-renewal of his contract. Thus, whether a particular teacher in a particular context has any right to such administrative hearing hinges on a question of state law. The Court's opinion makes this point very sharply: Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .
>
> Because the availability of the Fourteenth Amendment right to a prior administrative hearing turns in each case on a question of state law, the issue of abstention will arise in future cases contesting whether a particular teacher is entitled to a hearing prior to non-renewal of his contract. If relevant state contract law is unclear, a federal court should, in my view, abstain from deciding whether he is constitutionally entitled to a prior hearing, and the teacher should be left to resort to state courts on the questions arising under state law.

Mr. Justice Marshall, dissenting in part:

> I agree with Part I of the Court's opinion holding that respondent has presented a bona fide First Amendment claim that should be considered fully by the District Court. I would modify the judgment of the Court of Appeals to direct the District Court to enter summary judgment for respondent entitling him to a statement of reasons why his contract was not renewed and a hearing on disputed issues of fact.

Board of Regents v. Roth argued issues relative to whether or not a non-tenured teacher acquires due process

rights under a one year contract of employment.[66]

> Facts: Roth was a non-tenured assistant professor in his first year of his first teaching position in the Wisconsin public higher education system. In accordance with the relevant Wisconsin statutes and regulations, he was given timely notification that his contract would not be renewed for the second year. He filed suit in the federal court claiming that he was entitled to a statement of reasons for his non-retention and a pre-termination hearing to contest those reasons.
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> Issue: Does Roth have a legal right to a statement of reasons for his non-retention and a pre-termination hearing?
>
> Decision: No.
>
> Reasoning: (1) The requirements of procedural due process apply only to the deprivation of interests encompassed within the Fourteenth Amendment's protection of liberty and property. A public employer's decision not to retain a probationary employee did not ordinarily constitute a deprivation of liberty.
>
> > It stretches the concept too far to suggest that a person is deprived of liberty when he simply is not rehired on one job but remains free as before to seek another.
>
> (2) A public employer's decision not to retain a probationary employee did not ordinarily constitute a deprivation of property. The terms of the respondent's appointment secured absolutely no interest in reappointment for the next year. They supported absolutely no possible claim of entitlement to reemployment.

Issues relative to pre-termination hearings were decided in Papadopoulos v. Board of Higher Education. The court held:

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[66]Board of Regents v. Roth, 408 U.S. 564 (1972).

> Whether a public employee is entitled to a pre-termination hearing depends upon his entitlement to continued employment, i.e., his job security; the existence and extent of a public employee's job security depend upon state law governing public employment.[67]

The court indicated that employment contract of public employees may create the right to continue their employment over and above that provided by statute or regulation but such contract, standing alone, does not create interest requiring due process hearing before breach and employee's remedies are measured by law of contract, not by constitutional law.[68]

> Facts: Plaintiff is a state university professor (Oregon) of mathematics from September 1967 to June 1970. In 1969, defendant or its subordinate officils, decided to deny plaintiff his tenure and to terminate his employment. Plaintiff received a written notice of non-reappointment dated February 25, 1969. In December of 1968, the tenured faculty of the Plaintiff's Department voted 20-1 in favor of indefinite tenure for plaintiff. The chairman of the department added his own favorable recommendation. These recommendations were forwarded to John Ward, Dean of the School of Science, who in turn did not recommend plaintiff for tenure. Plaintiff appealed to the Review and Appeal Committee of the Faculty Senate who after a review of his case recommended to the president that indefinite tenure be granted to Dr. Michael Papadopoulos. The president after a review of the facts upheld plaintiff's non-renewal in a letter to plaintiff dated September 24, 1969. The Faculty Senate thus formed an Ad hoc Committee to study the situation. Their final report again recommended that tenure be granted to the plaintiff. The president, on Feburary 19, 1970, advised plaintiff that after reconsidering the

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[67] Papadopoulos v. Board of Higher Education, 511 P. 2d (1973).

[68] Papadopoulos v. Board of Higher Education.

Faculty Senate's recommendations, his decision (of September 24, 1969) remained the same. "This decision is based on the judgment that the Ad hoc Committee's report concerning the adequacy of performance constitutes additional reasonable doubt that tenure should be granted." Plaintiff then appealed to the Board of Higher Education. In March of 1970, the Board's Academic Affairs Committee held a hearing on plaintiff's appeal. The Committee limited its inquiry as to questions of procedure. It concluded that proper procedures were followed. Plaintiff filed with the circuit court which ruled that the Board had to accord plaintiff a hearing on the grounds for the termination of his employment. At the end of a four-day hearing the Board ruled "that the decision of the Oregon State University to grant indefinite tenure to Dr. Papadopoulos and not to renew his academic appointment are affirmed."

Issue: Was plaintiff entitled to a contested case hearing before the Board terminated his employment effective June 1970?

Decision: Yes.

Reasoning: One of the Board's regulations in effect at the time material to this case provided:

> If any appointment of an academic staff member--not on indefinite tenure, is to be terminated otherwise than for cause he shall be given a timely notice of termination as follows: at least twelve months' notice.
>
> 1969 Adm. Code Sec L-3-F.

The effect of this regulation is to entitle the Board's academic employees to continued employment unless and until they receive timely notice of termination in accordance with the requirements of the regulation. When June 1969 passed without plaintiff having been told his employment would be terminated effective June 1970 by somebody with authority to make that statement, he then had an entitlement to continued employment until June 1971.

In Schlecting v. Bergstrom, the court followed the reasoning of Curran v. Laird: "not all operations of

government are subject to judicial review even though they may have a profound effect upon our lives."[69] It pointed out that all levels of government occasionally make decisions based on "determinations that lie outside sound judicial domains in terms of aptitude, facilities and responsibility."[70] The court went on to say that personal decisions involving probationary employees are such matters.

> Facts: Plaintiff was discharged as a county employee. She claims her discharge was an arbitrary decision. A demurer was sustained and plaintiff appeals.
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> Issue: Did the plaintiff state a legal cause of action?
>
> Decision: No.
>
> Reasoning: The discharge of a probationary employee as the plaintiff is not subject for review for arbitrariness. The court went on to say: 'If we were to entertain the claim that a probationary employee discharge was arbitrary, then there would have to be an examination of the reasons for the discharge and the sufficiency of these reasons. This is a familiar exercise when a tenured public employee is discharged. If it is also necessary when a probationary employee is discharged, then the distinction between two groups of public employees has been rendered largely meaningless.'

Alberti v. County of Erie was a case in which a non-tenured teacher at the Erie Community College was held to

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[69] Schlecting v. Bergstrom, 511 P. 2d 846 (1973).

[70] Schlecting v. Bergstrom.

be entitled to timely notice of termination.[71] Compensation due to him was restricted to the pay for the year in which he would have worked if he had not been improperly terminated, less the amount of any earnings that he received that year.

Facts: Petitioner was hired by the Erie County Community College in September 1967. His appointment continued for two years until it was terminated by the Urban Center in August 1969, allegedly because of philosophical differences between the petitioner and the board of directors of the institution. Petitioner had taught for two years and his status was as a non-tenured but full term employee. Plaintiff instituted an Article 78 proceeding seeking reinstatement and back pay. Defendant contends that the procedural rights are not available to a faculty member who is not to be rehired at the conclusion of his yearly appointment.

Issue: Must notice of termination be given to a term appointee? Should plaintiff be reinstated?

Decision: 1. Yes.
2. No.

Reasoning: (1) The requirement that notice of termination be accorded a term employee (appointee) is not obviated. The Faculty Handbook requires that written notice be given to the term appointees as to whether their appointments will be renewed not later than February 15. The regulation under the Education Law requires a written notice to term appointee who has served for two years, not later than December 15. Petitioner was not given notice of his termination until May 1969 and even this was informal. No written notice was communicated until actual termination. Therefore, the decision not to rehire petitioner for the academic year 1969-1970 was defective for lack of timely notice. (2) Since the respondent (defendant) had the right to terminate petitioner without stating reasons, reinstatement is inappropriate. The purpose of the notice requirement is to provide appointees who

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[71] Albert v. County of Erie, 360 N.Y.S. 2d 343 (1974).

> are not being hired with an opportunity to look for other employment. We conclude that the petitioner is entitled to an award for the amount of his salary for the academic year 1969-1970, the year that he would have worked had he not been improperly terminated less the amount of any earning he received that year.

A non-tenured faculty person through his contract of employment, does not have a property right in or legal expectancy of further employment. was the holding in Shephard v. West Virginia Board of Regents.[72]

> Facts: Suit was brought against the West Virginia Board of Regents and others by a non-tenured assistant professor who sought to compel her re-employment for the 1973-74 school year, and to recover the wages and benefits to which she would have been entitled as such an employee during the said school term. On the defendant's motion to dismiss, the District Court held that (1) the defendant did not have any property rights in or legal expectancy of further employment, (2) she was given written notice of her non-reappointment by a communication more than 12 months before the expiration of her appointment for the 1972-73 academic year, consistent with controlling regulations, (3) she was not entitled to a statement of reasons for her non-reappointment or to a hearing thereon, and (4) the Board of Regents and its members, in their official capacity, are not "persons" within the meaning of the Civil Rights Act.
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> Issue: Does the complaint state a claim upon which relief may be granted?
>
> Decision: No.
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> Reasoning: (1) The West Virginia Board of Regents is authorized and empowered by law to make, promulgate, modify and amend as well as enforce rules and regulations relating to and controlling the employment, tenure and the non-reappointment of the faculty members at the state institutions under its jurisdiction. In this case, the regulations controlling

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[72] Shephard v. West Virginia Board of Regents, 378 F. Supp. 4 (1974).

the granting of tenure requires positive and affirmative action. Plaintiff was not granted tenure and had no property right in or legal expectancy of further employment. (2) Plaintiff was given written notice of her non-reappointment by communication of May 9, 1972, more than twelve months before the expiration of her appointment for the academic year 1972-1973, consistent with controlling regulations. The record discloses no issue as to any claimed protected rights under the First or Fourteenth Amendments to the Constitution. The plaintiff is not entitled to a statement of reasons for her non-reappointment or to a hearing on it.

Burdeau v. Trustees of the California State College held that a non-tenured assistant professor's personal hope or even expectation of re-employment or his sincere belief in his own qualifications gave him no hope or claim to a job for the ensuing year.[73]

Facts: Plaintiff appeals an opinion of the District Court dismissing without leave to amend the action he had filed resisting the failure of the university to rehire him. He was a probationary assistant professor with a one year appointment. On February 19, 1971, plaintiff was informed by President Pfau that he would not be re-employed. The letter gave no reason for the action. By California statute, the trustees have the power to provide by rule for the government of their appointees and employees, including reappointment of non-tenured academic employees. California State College, San Bernardino, has formulated procedures which include a consultative process for rehiring of professors. In accord with this process, President Pfau obtained the evaluations and recommendations of the Division of Social Sciences Committee on Retention, Promotion and Tenure: from the college-wide Committee on Retention, Promotion and Tenure; and from the Vice President for Academic Affairs. Individuals participating were to

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[73]Burdeau v. Trustees of California State College, 507 F. 2d 770 (1974).

evaluate and base their recommendations on teaching, professional recognized research and creative activity and college service. All three recommendations were considered by the president in his decision. Plaintiff availed himself of existing grievance procedures and a hearing was held upon his grievance. At the hearing, plaintiff refused to proceed until he was furnished the evidence that the several committees or President Pfau had relied upon in making their determinations, or until he had been given access to his personal file. With the matter in a standoff the plaintiff filed this suit. He claims a denial of his Fourteenth Amendment due process rights.

Issue: Did the plaintiff have a legal right to the materials from the file of the committee?

Decision: No. Judgment Affirmed.

Reasoning: The grievant had no information from the committees or their files as to their recommendations of findings and he was entitled to none. The Faculty By-Laws provide for the confidentiality of the committee's findings and recommendations. Therefore, where the state rules and the faculty rules do not provide a grievant with materials from the files of the committe, he may not be filing his grievance to turn the proceeding into a fishing expedition for the information he was not otherwise entitled to obtain.

Lyman v. Swartley was a case in which a tenured faculty person at the Idaho State University was terminated without being given the opportunity to respond. The court ordered the university to reinstate him and to provide him with monetary benefits because the Board of Education in the termination process violated the plaintiff's due process rights.[74]

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[74] Lyman v. Swartley, 385 F. Supp. 661 (1974).

Facts: Plaintiff is a tenured faculty member of the Idaho State University. In 1948, he began his duties at the school and has an impressive academic background being a medical doctor and also holding a doctorate in zoology. Defendants Swartly, Alford, Deaton, Hay, Munson and Thatcher are members of the Idaho State Board of Education which controls the Idaho State University. Defendant Benoit was not officially sworn in as a member of the board prior to the act complained of. Defendant Davis is the president and executive officer of the university and subject to the orders of the Board of Education. From April 3, 1973, through April 5, 1973, the board was in session in Moscow, Idaho, for the purpose of discussing faculty salaries, the input of faculty members, and proposed reappointments of faculty members at the institutions of higher learning in the state. The board directed the president to provide them with an indepth evaluation of Dr. Lyman on April 5, 1973. This was a unique procedure and set up an unprecedented occasion. Plaintiff was the one and only person selected for evaluation. Defendant Davis (President) delegated this duty to the University Faculty Advisory Committee, chaired by Dr. Kenneth Smith. Faculty members elected by faculty vote comprised the membership of this committee. Smith convened his committee and they voted less than unanimously to undertake their charge. An ad hoc subcommittee was appointed to prepare and submit the proposed guidelines for the evaluation process. Lyman was then invited to express his ideas for incorporation into the guidelines. On April 13, 1973, guidelines were formally adopted by the faculty committee. The plaintiff responded to the proposed evaluation quickly, positively and aggressively. He talked to Dr. Smith on the telephone on April 16, 1973, and wrote a letter addressed to Dr. Smith with copies to the board, to Davis, to the president of the local Chapter of the American Association of University Professors and of the Idaho State University Faculty and Professional Association. He also posted the letter on a bulletin board of the Biology Department and placed one on the table in the Student Union Building. The letter was admitted into evidence. As a result of the letter all agreed that Lyman's actions in writing the letter and talking to Smith had the effect of making a fair and impartial evaluation by the evaluation committee impossible. The

Faculty Committee felt that it could proceed impartially. There was a general consensus that the plaintiff's act constituted cause for discharge.

On April 23, 1973, the board notified the plaintiff that he was discharged because of his letter and telephone calls which had in effect thwarted a direct order of the board, i.e., the evaluation of Lyman. Lyman objected to this discharge and on May 12, 1973, appeared with counsel before a regular meeting of the board. Mr. Benoit speaking for the board announced that the board believed that it had the authority to discharge Lyman and stated that the phone calls and letter constituted cause for his discharge. Lyman's counsel indicated that no discharge of a tenured teacher without due process was authorized to determine the existence of good cause. The chairman offered to entertain a motion from the board to reconsider the discharge order but no motion was offered. The meeting then adjourned. Plaintiff represented by the attorneys of the Civil Liberties Union then entered the suit.

Issue: Were the plaintiff's rights to due process violated?

Decision: Yes.

Reasoning: (1) Tenure as a legal right means a reasonable expectation of continued employment, so long as the employment is performed properly. This right of public employment is a property right. A law. In such a case the due process requires as a minimum: (a) specification of charges of conduct or performance alleged to warrant deprivation of continued employment, (b) an opportunity to respond to those charges, and (c) a fair and impartial fact-finding process to determine the validity or non-validity of the charges. Here, the board without affording the plaintiff any opportunity to respond, determined, unilaterally, that cause for discharge existed and purported to terminate the employment. This action deprived the plaintiff of a valuable property right without due process of the law. (2) The court held that the plaintiff must be reinstated in his employment status. He was entitled to be reimbursed for the salary and other monetary benefits he should have received had he not been wrongfully

discharged. Defendants were ordered to reinstate the plaintiff and were restrained from any further acts designed to interfere with the plaintiff's right to employment except those in which due process is provided. Money damages from the individual defendants were denied as they were not motivated by bad faith.

Plaintiff's contract as an instructor was not renewed. The reason for the non-renewal was to allow for the employment of people working on their doctorate. Plaintiff claims this non-renewal was an infringement of her liberty interests. The court held that the non-renewal of the contract was not an infringement of liberty interests in Ducorbier v. Board of Supervisors of Louisiana State University.[75]

Facts: Plaintiff sues under the Civil Rights Act, 42 U.S.C. 1983, alleging that she was wrongfully discharged from her position as instructor at the University of New Orleans, formerly Louisiana State University in New Orleans (UNO). She was first employed as an associate in the Department of Sciences at UNO for one semester from September 1964 to January 1965. She left UNO to complete work on her master's degree in mathematics which she received in June 1965. Plaintiff was appointed as instructor of mathematics from September 1965 to May 1966. She was offered and accepted three successive appointments covering the periods September 1966 through May 1969. She only completed the first semester of the 1968-1969 contract when she resigned for maternity reasons. Plaintiff returned to UNO in September 1969 and served as instructor of mathematics for two successive academic appointments. These were September 1969-May 1971. In February 1971 she was notified that she would not be reappointed at UNO. Her period of notification was well within the

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[75]Ducorbier v. Board of Supervisors of Louisiana State University, 386 F. Supp. 202 (1974).

time recommended in the University Regulations and the American Association of University Professors. Plaintiff taught from September 1971 to May 1972, and she was not appointed for the following year.

In May 1972, plaintiff used the UNO grievance procedure by requesting that her case be reviewed by a grievance committee which consisted of five faculty members. This committee concluded that the plaintiff had not been unfairly treated and that there was no basis for her grievance. At all times after September 1965, the plaintiff's position at UNO was that of instructor. According to the University's By-Laws, the University Regulations, and the Faculty Handbook, persons with the rank of instructor are on an annual appointment and are not eligible for indefinite tenure.

Issue: Does the plaintiff have a legal cause of action for breach of contract?

Decision: No.

Reasoning: (1) The non-renewal of employment of a non-tenured teacher in order to implement a reduction in the size of the faculty does not require notice and hearing because such non-renewal does not stigmatize or label the teacher in a degrading way. As a matter of law, the court could not say that the non-renewal in order to reserve instructor's positions for persons working on their doctorate degree resulted in such stigma that her liberty interests were infringed. (2) The record sufficiently showed that if the college instructor was under the impression that she had tenure, such an impression was not reasonable in view of the year to year renewal of the contract of employment, as well as the explicit provisions on tenure in the University By-Laws, Regulations and Faculty Handbook.

Another case dealing with the issue of the termination of contract of a tenured professor was King v. Conservatorio de Musica de Puerto Rico. The findings in this case upheld the violation of the plaintiff's due process rights. A major factor in this case was the fact that the

defendant institution received public funds and was sufficiently entwined with the government to bring its action under the restriction of the Fourteenth Amendment.[76]

Facts: A civil rights action alleging that the plaintiff was "suspended from his duties and pay as Professor at the Conservatorio effective on January 14, 1975" without a prior hearing and because he is a Negro and/or Stateside American in violation of his rights to due process of law and of the Equal Protection Clause of the Fourteenth Amendment, respectively. A prayer is made for injunctive relief to stop the defendant from unconstitutionally terminating plaintiff's employment and for compensatory and punitive damages together with costs and reasonable attorneys' fees. Defendant answered the complaint and argues that the termination of the plaintiff's employment without prior hearing was carried out in accordance with the pertinent school regulations and, therefore, was legal. All allegations founded on discrimination have been denied. The regultions governing disciplinary proceedings at the Conservatorio de Musica provide full due process protection for all employees prior to involuntary termination of employment--including a prior hearing upon request. The regulations also provide that a professor may be suspended without prior procedural guarantees if both the Dean of Administration and the Dean of Studies consider it advisable. The defendants argue that the application of this regulation was proper because "no student wanted to enroll in the classes conducted by Professor King and the fact that the hearings on the charges would take more time, which would mean that there would be no teacher for percussion during the semester beginning in January was sufficient cause to take the action of suspension."

Issues:
1. Does a tenured professor have a legal right to a pre-termination hearing?
2. Is the plaintiff required to exhaust his state remedies before going to the Federal Court?
3. May a private beneficiary come within the structure of the Fourteenth Amendment?

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[76] King v. Conservatorio de Musica de Puerto Rico, 378 F. Supp. 746 (1974).

Decisions: 1. Yes.
2. No.
3. Yes.

Reasoning: (1) The Supreme Court has ruled that "a public college professor dismissed from an office held under tenure provisions has an interest in continued employment that is safeguarded by due process, and which includes the right to a prior hearing." (2) A Section 1983 plaintiff is not required to exhaust the state remedies before coming into the Federal Court: the federal remedy is separate, and it supplements the state remedy. (3) The defendant Conservatorio de Musica de Puerto Rico is a musical teaching center at the University level subsidized by annual appropriations by the legislature from the Treasury of the Government of the Commonwealth of Puerto Rico. Government financial support has been held to bring a private beneficiary within the strictures of the Fourteenth Amendment.

Chung v. Park held that a tenured professor's contract may be terminated for incompetence.[77]

Facts: This is a civil rights action pursuant to 42 U.S.C. section 1983 which was instituted by a college professor at Mansfield College who alleged that his constitutional rights had been violated when he was terminated at the school. In a prior decision the court held that the plaintiff was entitled to tenure under the college's tenure policy. The court then heard evidence on the issue of whether Dr. Chung received "due process" under the Fourteen Amendment to the Federal Constitution in the proceedings which led to his discharge. The Faculty Handbook sets forth the procedures to be utilized by the college in dismissing a tenured faculty member. The state claims that is is immune from that part of the plaintiff's claim which is based upon the embellishments to his federal constitutional rights contained in the Faculty Handbook. The Commonwealth made a motion for summary judgment in the immunity ground at the time of the trial which was denied. The Commonwealth also asserts that when Chung accepted the type of hearing which had been worked out by his attorney for the Commonwealth,

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[77]Chung v. Park, 377 F. Supp. 524 (1974).

he waived his right to the type of hearing which was prescribed by the Faculty Handbook. In any event, the Commonwealth claims that the scope of the hearings received by the plaintiff was in all respects in conformity with the requirements of the "due process" clause of the Constitution. Dr. Chung received an eight day hearing. No interest in liberty such as free speech was involved. The hearing panel after an exhaustive hearing, clearly found that Dr. Park's reasons for dismissal of Dr. Chung were indeed motivated by the two factors noted, intransigfence and incompetence.

Issues: 1. May a college use sovereign immunity as a defense?
2. Did Dr. Chung have a "due process hearing"?
3. Was there a breach of contract?

Decisions: 1. No.
2. Yes.
3. Yes.

Reasoning: (1) The defense of sovereign immunity can be waived by a general appearance and litigation in federal court. The court had no hint that the Commonwealth would indeed raise this defense until the receipt of a letter dated March 27, 1974, by the Deputy Attorney General Robert F. Nagel several days before the hearing. No evidence was introduced on this issue at trial and legal argument will not be entertained at this time. (2) Contractual provisions can be waived expressly or impliedly. Through the process of negotiation, Dr. Chung made the conscious choice of obtaining a "due process" hearing which had some procedural aspects which were different from those employed in a normal tenure revocation proceeding. The burden of proof rested upon Dr. Chung in his hearing. A careful reading of the materials surrounding the hearing afforded Dr. Chung has convinced the court that the college came forward with all the evidence necessary to establish that Dr. Chung's lack of competency and that Dr. Chung had the opportunity to refute all the evidence presented. The hearing was held prior to the effective date of his termina-

> tion of employment. (3) There was no breach of contract by Mansfield State College in failing to follow the precise procedure of the Faculty Handbook as Dr. Chung did not request that those procedures be followed in his case.

A college librarian received a judgment for a one-year renewal of her contract in Barrett v. Eastern Iowa Community College.[78] This was a case in which how does one terminate a contract was an issue. The court, for colleges and universities ruled that the college librarian to whom statutorily required notice that the Board of Directors was considering terminating her contract was mailed with 65 cents postage due and who did not receive a second notice, which was properly stamped, until three days after the statutory deadline, did not receive timely notice of her termination and thus her contract was automatically renewed for an additional year.[79]

> Facts: On May 15, 1970, plaintiff and defendant entered into a written employment contract, under which the plaintiff agreed to serve as libraian and receive from the defendant $916.00 on the last day of the month for 12 consecutive months starting on the last day of September 1970. The term of the employment was to begin on August 24, 1970 and end on July 30, 1971. Code section 279.13 in regard to such contracts required the college by certified letter, to mail the notice of termination not later than the tenth of April.
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> On March 25, 1971, the defendant's board of directors decided that contracts for Marguerite Barrett, librarian, and---, be terminated effective

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[78] Barrett v. Eastern Iowa Community College, Dist., 221 N.W. 2d 781 (1974).

[79] Barrett v. Eastern Iowa Community College.

at the end of the 1970-71 academic year and that the board Secretary be directed to mail letter of intent to terminate by March 26, 1971, and letters of termination by April 10, 1971, as prescribed by Chapter 279, Section 13 of the Code of Iowa. The board Secretary on March 26, 1971, prepared and by certified mail, with proper stamps attached, mailed to the plaintiff a "Notice of Consideration of Termination of Teacher's continuing contract." On April 6, 1971, the secretary of defendant's Superintendent took a typed letter of termination addressed to the plaintiff, Davenport, Iowa. She testified that "When I came to the post office substation at the Schlegal Drug Store in Davenport, I had a 6-cent stamp, which was required on it, and I told the lady at the substation what I wanted, and that I wanted the letter mailed Certified Mailing and I paid for it and obtained a receipt. The receipt of the substation was made out by the lady at the post office substation." When the letter was delivered to the plaintiff at her home in Clinton it was stamped "Certified Mail" and "Postage Due 65 cents." Another certified letter, with proper postage attached, was mailed on April 13, 1971. Defendant concedes the second mailing was not timely. Following April 13, plaintiff was afforded a hearing before the board. It made no change of the termination action voted, without plaintiff's knowledge on March 2.

Issue: Was the contract legally terminated?

Decision: No.

Reasoning: (1) Statutory provisions specifically require the college by certified letter to mail the notice of termination not later than April 10. The verb mail means: To place a letter or other mail matter, properly enveloped or packaged, addressed and stamped, in a mail slot, mail chute, or mail box, provided by the post office department for reception of mail, or to deliver a letter or other mail matter so prepared to a postman or letter carrier employed by the department. The trial court without the benefit of Flanders v. Waterloo Community College erroneously applied the substantial compliance rule. Plaintiff on the record made was entitled to a judgment declaring

> defendant had failed to give termination notice not later than April 10, 1971, and therefore her contract was automatically renewed for another year.

Another case arising out of retrenchment was the American Association of University Professors, Bloomfield College Chapter v. Bloomfield College.[80] This case involved a collective bargaining contract as well as a personal contract. The law of contract was applied consistently in this case.

> Facts: Action for declaratory relief and specific performance in relation to the academic tenure of faculty members at Bloomfield College. Bloomfield College is a private institution of higher education licensed under the laws of the State of New Jersey. Plaintiff is a labor organization within the meaning of the National Labor Relations Act, 29 U.S.C.A. section 152, and for the purposes of Article I, paragraph 19 of the 1947 New Jersey Constitution, which has been certified and recognized by the National Labor Relations Board as the exclusive representative for collective bargaining on behalf of the college faculty. The individual plaintiffs include faculty members who seek clarification of their claimed tenured status and those services have been terminated and seek reinstatement to their former positions. Their periods of accumulated service range from 8 to 22 years. In addition to Bloomfield College, also named as defendants are Merle F. Allhouse, president of the college, and the individual members of the college board of trustees. The legal basis for the claim of tenure is to be found in the Faculty Handbook of the college under the heading of "Bloomfield College Policies on Employment and Tenure." This document forms an essential part of the contractual terms governing the relationship between the college and faculty. Under paragraph C thereof tenure is a means to certain ends, namely: (1) freedom of teaching and research

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[80] American Association of University Professors v. Bloomfield College, 322 A. 2d 846 (1974).

and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Tenure (freedom and security) are indispensable to the success of an institution in fulfilling its obligations to its students and to society. Following a probationary period of seven years, which all the plaintiffs completed, subparagraph C(3) provides:

> . . . a teacher will have tenure and his services may be terminated only for adequate cause, except in case of retirement for age, or under extraordinary circumstances because of financial exigency of the institution.

Pertinent also in subparagraph C(6) of the "Policies" which provides:

> Termination of continuous appointment because of financial exigency of the institution must be demonstrably bona fide. A situation which makes drastic retrenchment of this sort necessary precludes expansion of the staff at other points at the same time, except in extraordinary circumstances.

On June 21, 1973, the Board of Trustees adopted Resolution R-58 which in material part resolved:

> Upon the recommendation of the Executive Committee, the President, the Dean of the College, and with the advice of faculty size due to financial exigency, and in accordance with the action of the Board on March 1 and of the special Evaluation Committeee for the reduction the recommendation of the Academic Affairs Committee that thirteen faculty members be terminated in the reduction of faculty size due to financial exigency, the following persons be informed that they will be terminated as of June 30, 1974, and their duties for the 1973-74 academic year be defined to include no teaching, participation in College governance, or voting privileges.

Defendant Allhouse on June 29, 1973, notified 13 members of the faculty that it was his "unpleasant duty to inform you that the Board of Directors, at its

meeting on June 21, 1973, took action to terminate your services as part of the reduction of the faculty size due to financial exigency." On the same day, all the remaining members of the faculty, tenured and non-tenured, were notified by letter memorandum that at the June 21 meeting, the Board of Trustees "took action to the effect that every faculty member should be informed that all the 1973-74 contracts are one year terminal contracts." Between June 21, 1973, and the commencement of the school year, the college engaged the services of 12 new and untenured faculty members, defendants assert that they were hired to replace others who were lost to the school over a period of time as the result of "normal attrition," not those who were terminated under Resolution R-58.

Issues: 1. Did the action taken follow from a bona fide belief on the part of the Board of Directors in the existence of a financial exigency?
2. Was there sufficient evidence of "exigency"?

Decisions: 1. No.
2. No.

Reasoning: (1) The court held that the actions of Bloomfield College with respect to the tenured status of its faculty members in terminating the services of some and placing others on one year employment contracts under the circumstances presented overflowed the limits of its authority as defined by its own policies, and therefore failed to constitute a legally valid interruption in the individual plaintiffs' continuity of service. Whatever other motivations defendants might have had, they have failed to demonstrate by a preponderance of the evidence that their purposed action in good faith related to a condition of financial exigency within the institution. (2) Further confirming the impression that the defendant's primary objective was the abolition of tenure at Bloomfield College, not the alleviation of financial stringency, is their careful eschewal of other obvious remedial measures such as across the board salary reductions for all faculty members and the reduction of faculty size by the non-renewal of contracts with teachers on probationary status, rather

than the termination of those who had earned tenured status by years of competent service. The reasons of economy were used in a subterfuge. Therefore, the dismissal of the tenured teachers is held to be invalid.

"Meetings of the minds" concept in the law of contract was the essence of Tobin v. Louisiana State Board of Education.[81] Here, the court held that there cannot be a contract unless the wills of the parties coincide, and even when there has been unequivocal communication of consent in writing, obligations arising from it still may not be enforceable if the consent has been produced by some vice.[82]

Facts: Suit for damages arising out of breach of contract. Judgment was for dismissal and the plaintiff appeals. In March 1969, the plaintiff was employed teaching history at the Southern University in Baton Rouge. Plaintiff was in his sixth year of teaching and held the rank of Assistant Professor. In a conference with his department chairman (Dr. Cobb), plaintiff told him that he intended to pursue a Ph.D. degree in history during the academic year of 1969-1970. On March 19, 1969, Mr. Tobin wrote Dr. Cobb saying that he did not plan to work at Southern during the 1969-1970 academic year. Plaintiff applied for admission to two graduate schools. On or before May 1, 1969, the plaintiff had either been rejected by both schools or knew that he was going to be rejected. After a short time the plaintiff received a letter dated May 1, 1969. At the bottom of the letter was a place for the plaintiff to indicate whether his services would or would not be available to Southern for the coming year. Plaintiff did not sign or return the letter.

Plaintiff testified that he had received a similar

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[81]Tobin v. Louisiana State Board of Education, 319 So. 2d 823 (1975).

[82]Tobin v. Louisiana State Board of Education.

letter the year before, which he had not returned, and that he had eventually received his contract of employment. In early August 1969, the plaintiff received a contract for the 1969-1970 school year, signed by the president of the university. The plaintiff signed it and returned it to the university within a few days. In the middle of August, the plaintiff testified that he had a brief meeting with Dr. Cobb at the post office at Southern. He testified that he told Dr. Cobb that he had received a contract. He could not remember Dr. Cobb's response. Dr. Cobb had relinquished his post as Chairman of the History Department to Dr. Moran at that time. He had no recollection of the meeting. On September 5, 1969, the plaintiff called Dr. Moran to inquire why he had not been called to return to work. The plaintiff testified that he was told that he would be placed on the registration committee, but he heard nothing further. Dr. Moran testified that he told the plaintiff that he had not been called because he was not expected to teach during the coming year. On September 19, 1969, the plaintiff sent a telegram to the president of the university asking if the university intended to honor the contract of employment. The Dean of the College of Arts responded the same day, saying:

> Appears contract missent through clerical error. Department Chairman indicated your intention to return to school. Consequently, no courses assigned you this fall. Kindly inform me of your plans for further study.

Plaintiff consulted counsel and entered this suit. Plaintiff testified that had he not received the letter of May 1, 1969, and the contract, he would have sought employment elsewhere. He relied on the contract with Southern University. It is clear from the testimony in the record that both the letter of May 1 and the contract were sent in error. The plaintiff was not expected to teach in the 1969-1970 academic year and a replacement was obtained for him that year.

Issues: Did the plaintiff have a valid contract?

Decision: No. Judgment Affirmed.

Reasoning: The court held:

> It was clear from the evidence offered that Southern University sent the contract to the plaintiff by mistake, and that it never intended to offer the position to him. Since the plaintiff never advised the university of any change in his plans to further his education, he must have known that he was not expected to teach in the 1969-1970 year. His own consent to the contract was flawed. This was because when he signed the contract, he knew or should have known that it did not represent the true intention of Southern University. If the wills of the party concurred in anything, it was that the plaintiff would not teach at Southern during the 1969-1970 academic year. The court went on to indicate that it is fundamental in our law of contract that there can be no contract unless the wills of the parties coincide. Article 1766 of the Civil Code provides that no contract is complete without the consent of both of the parties.

Under evidence that the teaching professor was appointed temporarily to the university, and that university regulation allowed termination of temporary appointments at will, the university's termination of a professorship without citing cause was within the terms of the contract was a rule of law in Pryles v. State.[83]

> Facts: Claim is for damages arising from the alleged wrongful discharge of plaintiff from his position of Professor in the Pediatric Department of the state Medical Center of the State University of New York (School). In 1965, plaintiff was hired to serve jointly as the Director of Pediatrics at the Brooklyn Jewish Hospital and Professor of Pediatrics at the Medical School. In addition to being in charge of the hospital's pediatric department and the teaching of pediatrics at the hospital to medical students of the school, his professional duties would also include supervising the other doctors teaching

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[83]Pryles v. State, 380 N.Y.S. 2d 628 (1975).

pediatrics at the hospital. Plaintiff's appointment was temporary, apparently because his salary was paid exclusively by the hospital and the school would not give permanent appointment to professors whose salaries it did not pay.

Plaintiff served in this dual capacity for seven years until he was discharged by the hospital in November 1972 because of dissatisfaction with the performance of his administrative duties. The school was aware of plaintiff's problem with the hospital, but did not object to his discharge. On January 23, 1973, plaintiff wrote to the then president of the school requesting clarification of his status with the school indicating that he declined to stay at the school. The president replied on February 26, 1973, that when the plaintiff's activities at the hospital terminated, "it is my obligation to also terminate your professorship." Plaintiff then entered this claim for damages for loss of wages, loss of reputation, and reinstatement.

Issue: Does plaintiff have a cause of action in contract for breach?

Decision: No.

Reasoning: The plaintiff's letter of appointment clearly specified the appointment unequivocally stated a temporary appointment was terminable at will. The representations which allegedly were made by the employer are not only inadmissible to bind the state because of their hearing nature, but they are also immaterial. There are no ambiguities (the regulations are definite on the termability of temporary appointments) and that rule proscribes the use of prior oral representations to vary the terms of the contract. The court, therefore, finds plaintiff only received a temporary appointment in 1965. By its terms, said appointment was terminable at will by the president of the school. The court further held that prerequisites for a tenured continuing appointment were not present here and, therefore, such an appointment could not rise by estoppel or otherwise.

Michigan College Federation of Teachers v. Lake Michigan Community College involved rights of faculty who

participated in a strike. This case brought forth the following rule of law: Due process liberty interests are not implicated when a teacher is charged with failure to meet minimum standards in his professional relationship with students.[84]

Facts: Teachers at community junior college and their union brought action against college board of trustees, college and the president of the college for reinstatement with damages after the teachers had been discharged for allegedly participating in an illegal strike. The District Court entered a temporary restraining order which was vacated by the Court of Appeals. The United States District Court for the Western District of Michigan, Noel P. Fox, Chief Judge, granted remedial relief against the college and the college appealed. The Court of Appeals, Harry Phillips, Chief Judge, held that in the circumstances of the case the striking teachers did not enjoy the protection of the due process clause in that teachers were not deprived of a property interest or a liberty interest by their discharge; and that even if the teachers were within the protection of the due process clause the hearings to be conducted before the college board of trustrees would not be procedurally deficient.

Issue: Were plaintiff's due process rights violated?

Decision: No.

Reasoning: Where the only fact that community college board of trustees would be called upon to decide was whether a particular employee in fact participated in illegal strike and board's sole objective in conducting hearings is to assure that the innocent teachers were not mistakenly identified as strikers, hearings on discharges would satisfy the procedural due process requirement of an impartial decision maker even though college was the party against whom the strike was directed.

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[84]Michigan College Federation of Teachers v. Lake Michigan Community College, 518 F. 2d 1091 (1975).

Holstrop v. Board of Junior Colleges pointed out that even if the president of the Public Junior College deceived the board by the manner in which he submitted the renewal of his contract, this fact did not establish that he did not have property interest subject to due process protection. Apart from the fact that had not it been superseded, the earlier contract would have been in effect at the time of termination. The new contract was at most voidable for fraud. As there was a genuine dispute on the issue of fraud, the president, asserting denial of due process in connection with his discharge, had a claim of entitlement that gave him a right to a hearing. This was true with respect to the issue raised by contention that there was no meeting of the minds on the new contract.[85]

> Facts: Plaintiff was appointed President and Chief Administrative officer of Prairie State Junior College in Chicago Heights by the defendants through a series of contracts which extended his tenure until June 30, 1972. On May 25, 1970, as part of his official duties, plaintiff prepared a confidential memorandum for circulation among his administrative staff which requested that the staff consider certain proposed changes in the college's ethnic studies program for discussion at the next staff meeting. An unknown party made the memo public. Plaintiff, on July 13, 1970, was summoned to the office of the Counsel of the board and told he had the choice of resigning or being fired. The publication of the memorandum was mentioned as the basis for firing but he was told that he would be fired without notification. A list of charges that

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[85]Holstrop v. Board of Junior Colleges, 523 F. 2d 569 (1975).

supposedly justified his termination was given him after his termination. Plaintiff claimed that the facts showed a deprivation of his right to free speech and a denial of due process of law and his contract rights. District court held for the defendants.

Issue: 1. Were the First Amendment rights violated?
2. Did plaintiff have a property right in his job?
3. Was the Board empowered to make more than a one year contract?
4. Did the plaintiff get a fair hearing?

Decision: 1. No.
2. Yes.
3. Yes.
4. No.

Reasoning: (1) The evidence indicates, and the District Court could properly have found, that the board members were disturbed because a memorandum proposing the repudiation of their commitment to continue the ethnic studies program for another year was withheld from them until the fortuitous leak to the newspaper compelled its disclosure to them, which occurred less than three weeks before the date proposed in the memorandum for effectuations of this highly controversial action; and this "timing and concealment" rather than expression of views "in the memorandum" constituted one of the reasons for the board's action. The facts do not show a violation of the plaintiff's First Amendment rights. (2) Plaintiff had a claim of entitlement to his job even assuming he deceived the defendant by the manner in which he submitted the form for the new contract. Apart from the fact that the earlier contract covering the period July 1, 1969 to June 30, 1971, would still have been in effect if the new contract had not superseded it. The new contract was at most voidable for fraud, not void. So long as there was a genuine dispute on the issue of fraud, plaintiff had a claim of entitlement that gave him a right to a hearing. The same is true as to the issue raised by the contention that there was no meeting of the minds assuming that issue to be analytically different from the fraud issue. (3) In 1927, the Illinois General Assembly conferred on school boards the power to con-

> tract with teachers, principals and superintendents for a period of three years after an expiration of a two year period. Thus, we think that the board empowered to enter into contracts for a duration of longer than one year. In the case at bar, the board prior to the April 1970 election, purported to extend plaintiff's contract until June 30, 1972, or two years beyond its term. After the mid-April election, the new board did not object to the plaintiff's new contract and permitted him on July 1, 1970, to commence serving under it. This adoption of the contract by the new board meant that plaintiff had a valid contract at least through June 30, 1971. This is so whether plaintiff was working under his original (1969-1971) or his superseding (1970-1972) contract. We also conclude under the enabling statutes and the board's own rules adopted pursuant to the statute, the board had authority to contract with the president of the college for a period of more than one year. (4) The court stated "our review of the evidence leaves us with the definite and firm conviction that plaintiff was never offered a fair hearing on termination, and that, in fact, the board prejudged his case before making any hearing available to him."

The court decided two rules of law relevant to colleges and universities in Decker v. Worcester Junior College. They are: (1) If a college drops a formal procedure requiring that a faculty member be given notice as of a certain date if he is not to be reappointed to the faculty, the college can be bound to the terms of the procedure;[86] and (2) The Executive Committee of the College Board of Directors, in adopting "a policy of seeking to establish probable enrollment for the coming year in sufficient time to permit decisions to be made on faculty needs, and to allow faculty contracts to be extended on or

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[86]Decker v. Worcester Junior College, 336 N.E. 2d 909 (1975).

about March 1 annually," had not adopted a policy to effect that the reappointment of a faculty member was automatic unless he received notification on or about March 1 that he was not to be reappointed.[87]

> Facts: College faculty members who were not reappointed brought a bill seeking determination that they had been reappointed for another academic year because they had not received a lawfully effective notice of the termination of their appointments. The plaintiffs were reappointed in March 1972 to the faculty of the defendant college for the academic year 1971-1973. Each had received and countersigned annual letters of reappointment in prior years. Allegedly, because of the college's financial problems, neither one was reappointed for the 1973-1974 academic year. They sue seeking a determination that they, in effect, had been reappointed for another academic year because they had not received a lawfully effective notice of the termination of their appointment pursuant to an alleged policy and practice of the college.
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> Issue: Were the plaintiffs rehired for the 1973-1974 academic year?
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> Decision: No.
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> Reasoning: The Executive Committee of the college's Board of Directors adopted the policy of seeking to establish probable enrollment for each coming year in sufficient time to permit decisions to be made on faculty needs. This allowed faculty contracts to be extended on or about March 1st annually. This policy does not contain a commitment to the plaintiffs or an assurance of reappointment in the absence of notice to the contrary.

Under college and university's teacher's tenure law, pursuant to which State Board of Education adopted regulations imposing a three year probationary period, and by

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[87] Decker v. Worcester Junior College.

virtue of a special contract resulting from the teacher's accepting appointment as a university teacher, upon affirmative representation that tenure was acquired after three years of satisfactory probationary service, teacher acquired tenure upon completion of such and was entitled to all rights and privileges inherent in that status, even though it was the practice to grant tenure only upon the recommendation of the university president and upon approval of the state board was the rule in State ex rel Chapdelaine v. Torrence.[88]

> Facts: Appellee (Chapdelaine) applied to Tennessee State University for a position of Assistant Professor. The Dean of Faculty, on May 27, 1966, notified in writing that he was being recommended to the State Board of Education for employment effective September 15, 1966. The Dean advised: "The University offers the faculty certain fringe benefits such as: Teacher retirement, tenure after three years of satisfactory service, group life and hospital service, free admission to all University-sponsored cultural and athletic programs and social security benefits." Appellee relied upon this offer of appointment and their representations and accepted the tenured position and received a letter from the Dean finalizing his appointment. He was re-employed for the next two years and completed his three-year probationary period in June 1969, and was employed for the school year 1969-1970. His salary was also increased. Statute provided for tenure for a teacher who has been employed by the Board and has served for at least three school years. The president of the State University thought the probationary period was five years and gave tenure only after a satisfactory probation period of five years.
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> Issue: Did Appellee acquire tenure under his contract of employment?

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[88]State ex rel Chapdelaine v. Torrence, 532 S.W. 2d 542 (1975).

Decision: Yes.

Reasoning: Appellee accepted appointment in reliance upon the affirmative representation that among the fringe benefits offered by the university was tenure after three years of satisfactory service. This created a viable understanding that satisfactory service for three years would result in tenure status. A college can create a contractural relationship, independent of tenure laws, which would result in tenure. Courts may apply the conventional standard of transactions in the marketplace to any agreements reached by the unqualified acceptance of an unqualified offer.

The terms of employment by contract is property interest which cannot be extinguished without conforming to dictates of due process and this property interest consists not only of right of receipt of money under employment contract but also to hold the position in a maxim law set forth by McClanahan v. Cochise College.[89]

Facts: McClanahan was a continuing education teacher who was first employed as a full time classroom teacher and subsequently as a Dean of Occupational Instruction. His contract had been renewed for more than four consecutive years of employment with Cochise College. His contract for 1972-1973 was as Dean of Occupational Instruction. His total tenure at the college was in excess of eight years. On June 9, 1972, he was given until February 1, 1973 to resign as Dean of Occupational Instruction. On January 19, 1973, the governing board of Cochise College gave him notice that his services with the institution would be terminated. In accordance with Policy 2019 of the College Manual and Policy 2006 he requested a hearing. Prior to the hearing set for April 1973, plaintiff's attorneys were notified that the college would not allow faculty witnesses to be called to testify in plaintiff's behalf nor would a transcript of the hearing be made available. Plaintiff brought an action in the U.S. District Court which ordered a hearing before the Governing Body of

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[89]McClanahan v. Cochise College, 540 P. 2d 744 (1975).

Cochise College. The hearing was held and plaintiff was terminated for cause.

Issue: 1. Whether the due process hearing must be held prior to the termination of the contract or can it be held post-termination?
2. Is a community college district a political subdivision of the state?

Decision: 1. Either.
2. Yes.

Reasoning: A term of employment by contract has been recognized as a property interest which cannot be extinguished without conforming to the dictates of due process. This contractual property interest consists not only of the receipt of money under the employment contract, but also of the right to hold the position. The court also said:

> once it is determined that due process applies, the question becomes--what due process is due? Due process if flexible and calls for such procedural protection as particular situation demands.

McLachlan et al., v. Tacoma Community College District No. 22 laid the precedent that Community College teachers who knew they were hired on a full time basis for one year to replace teachers on sabbatical leave and who were employed under contracts in which they waived "all rights normally provided by the tenure laws of the state," validly waived their rights to statutory notice of non-renewal of their one year contract, despite arguments that public policy prohibited such waiver. They also validly waived their statutory right to converging of evaluation committee to review their progress in their

progress in their teaching courses.[90]

Facts: Four instructors, who were employed at defendant community college, under part time teaching contracts for the 1971-1972 school year, sued seeking reclassification of their status to full time faculty appointees and enforcement of statutory tenure rights. Superior Court entered summary judgment for defendant and dismissal of complaint. Plaintiffs appeal.

Part A

Facts: Two plaintiffs, McLachlan and Wiseman were employed by the college for the 1970-1971 school year under full time teaching contracts. Their contract provided in part:

> This contract is written for one year only. During that time, the employed waives all rights normally provided by the tenure laws of the State of Washington.

They taught during the 1970-1971 school year and were not notified of any decision that their full time contracts would not be renewed. However, at the time of contracting, they were told their employment was to replace full time instructors on sabbatical leave. In September 1971, McLachlan and Wiseman were offered part time teaching contracts for the fall of 1971 and later for the spring of 1972.

Issues: 1. Did McLachlan and Wiseman validly waive their right to statutory notice of non-renewal of their one-year contract?
2. Did they validly waive their statutory right to continuing evaluation?

Decisions: 1. Yes.
2. Yes.

Reasoning: (1) Neither McLachlan nor Wiseman filled a vacant, full time teaching position. Both knew they were being hired to replace faculty who continued

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[90] McLachlan et al., v. Tacoma Community College Dist. No. 22, 541 P. 2d 1010 (1975).

to hold their tenured positions while on sabbatical leave. A teacher may waive the statutory renewal notice provisions in advance of the notice date, provided he knows the purpose of his employment is to replace the regular occupant of that position who is on a one year sabbatical leave. McLachlan and Wiseman validly waived their rights to statutory notice of non-renewal of their one year contract. (2) We also see no serious reason why a probationary faculty member should be prohibited from waiving the benefit of a possible recommendation to tenured status after an abbreviated period of teaching.

Part B

Facts: Adams and Shelley were employed by the defendant to teach under a part time quarterly contract, in the 1970-1971 school year. In the 1971-1972 year, they accepted contracts to teach in excess of 10 hours per week in the 1971-1972 school year. Interim, a collective bargaining agreement was signed by defendant which provided:

> No faculty member who teaches more than ten credit hours unless he replaces a person for one year on a sabbatical leave. A person who has taught more than ten hours per quarter during the 1970-1971 year on a part time basis is excluded from this limitation for 1971-1972 year only.

Plaintiffs claim this agreement is arbitary, irrational and unenforceable.

Issue: Is the collective bargaining agreement arbitrary, irrational and unenforceable?

Decision: No.

Reasoning: The court found that the collective bargaining contract enlarged the number of persons to whom part time contracts could be offered and, specificially as to Adams and Shelley, preserved for them the right to teach (and be paid for) a greater number of hours than otherwise would have been available to them. The court further held that: we do not find that an instructor's contractual obligations under a full time contract are distinctly dif-

ferent from and greater than an instructor's obligations under a part time contract.

At the end of each yearly appointment, assuming proper notice, the school administration could choose not to renew college teacher's employment for any reason or for no reason other than for a constitutionally impermissible reason such as race. Even assuming a college teacher received a favorable tenure recommendation from his immediate peers in the faculty, Nace v. Oregon State System of Higher Education held this did not create any right to tenure under the statutory scheme, as personnel decisions as to faculty members are made by the Board of Higher Education and its subordinate officials.[91]

> Facts: Petitioner appeals from a decision of the State Board of Higher Education made by its subordinates, affirming the non-renewal of his annual appointment to the faculty at the Oregon College of Education. Petitioner received a series of three one year appointments to the OCE faculty. They were "yearly tenure" appointments. They provided that the petitioner could not be discharged during the year except for cause, but did not guarantee that petitioner's employment would necessarily be renewed for following years. After three years' employment, petitioner was entitled to one year's notification that his employment would not be renewed. At the end of the petitioner's third year, college officials notified him that his fourth year would be his last. Petitioner objected to that decision. A series of informal efforts to mediate the dispute were unsuccessful. The Board, through counsel, then afforded petitioner a formal

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[91]Nace v. Oregon State System of Higher Education, 543 P. 2d 687 (1975).

contested case hearing pursuant to the Administrative Procedures Act, ORS Ch. 183. The formal hearing was conducted before a subcommittee of the Faculty Welfare Committee of the OCE Faculty Senate. The committee recommendations were generally favorable to petitioner. On review, the college president's findings and conclusions were all adverse to petitioner, the ultimate conclusion was "the termination" of Dr. John B. Nace as a faculty member of Oregon College of Education is hereby affirmed."

Issue: 1. Does the Due Process Clause prohibit the government from depriving citizens of liberty or property?
2. If a faculty person receives a favorable peer evaluation for tenure, does this recommendation create any "right" to tenure?

Decisions: 1. No.
2. No.

Reasoning: (1) All the Due Process Clause requires is that, in circumstances such as these, government action be preceded by allowing the affected citizen an opportunity to be heard. The court indicated that petitioner was heard thus, the possible existence and extent of his alleged property interests are now irrelevant, and (2) The court clearly indicated, but assuming for the sake of discussion that petitioner received a favorable tenure recommendation from his immediate peers on the faculty, this does not create any right to tenure. Under the statutory scheme, ORS 351. 070(1) a, personnel decisions are made by the State Board and its subordinate officials--in other words, the administration.

Statutory provisions that Regents of a university had power to remove any officer connected with the university when, in their judgment, interests required that it was insufficient to justify discharge of the head football coach from the university in absence of evidence that the

coach was an officer of the university was a holding in Feldman v. Regents of New Mexico.[92]

> Facts: Plaintiff is a head football coach was discharged during his contract term. He sued alleging five theories for recovery of damages. When defendants moved to dismiss, parties stipulated that the motion to dismiss be considered a motion for summary judgment.
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> Issue: Is defendant entitled to a summary judgment?
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> Decision: No.
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> Reasoning: Absent a showing that the plaintiff did or did not exhaust his administrative remedies prior to this suit, the court held that the defendants failed to make a prima facie showing entitling them to summary judgment.

Contracts between board of regents of state university systems and faculty members included relevant state laws and consitutional provisions as they existed when contracts were signed in a rule of law from Georgia Association of Education v. Harris.[93]

> Facts: This is a class action, under the 1871 civil rights statute, seeking declaratory and injunctive relief with respect to certain contracts of employment between the Board of Regents of a university of Georgia system and faculty members. This action was filed by the Georgia Conference of American Association of University Professors, the Georgia Association of Educators, and certain aggrieved faculty members of those associations against the Board of Regents of the university system of Georgia. The plaintiffs attack the announced intention of the Board of Regents not to honor the

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[92]Feldman v. Regents of New Mexico, 540 P. 2d 872 (1975).

[93]Georgia Association of Education v. Harris, 403 F. Supp. 961 (1975).

stated salary terms of the plaintiff's faculty employment contract for the 1975-1976 academic year as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Georgia Constitution. Defendants moved to stay proceedings pending adjudication of pending state court proceedings.

Issue: Should defendant's motion be granted?

Decision: Yes.

Reasoning: All of the substantial claims raised by the plaintiffs arise from the alleged breach of the employment contracts by the defendant Board of Regents and the dimensions, interpretation and construction of the subject employment contract is a matter of state law. Basic contract law dictates that all contracts include relevant state laws and constitutional provisions. The instant action is in the state court, therefore motion granted.

Collins v. Wolfson was a case in which in a period of retrenchment, several Miami-Dade Community College teachers were not rehired. This action was to implement a reduction in the size in college personnel. Question arose in litigation as to whether or not the trustees of the college made their decision of non-renewal in light of their established criteria. The court held that a tenured teacher has the legal right to a due process hearing. The purpose of the hearing would be to assure that his position was in fact 'discontinued' within the meaning of the contract and, if he was instead the victim of a 'reduction in force' that the trustees made their decisions pursuant to their previously announced cri-

teria.[94]

Facts: Suit by seven instructors who allege that their non-renewals were effected pursuant to an arbitrary and subjective set of criteria employed by the Board of Trustees in determining which teachers would not be rehired on the school's implementing a reduction in the size of personnel. One of the four instructors charged that his non-renewal was retaliatory in nature to punish him for participation in a well published political demonstration at the Democratic National Convention in July 1972. Two instructors charged the arbitrary nature of the board's evaluative criteria. One claimed that he enjoyed the Miami-Dade's genre of tenure, a "continuing contact" and that this vested property interest was not summarily defeasible by the board's couching the termination as a "reduction in force" rather than as a discharge. In an amended complaint, three additional instructors joined as plaintiffs alleging that, although their employment was not terminated, their constitutional rights were violated by a college official's depositing in their files an uncomplimentary memorandum charging neglect of duty for their unexcused absence from campus on the morning of February 7, 1973, and inviting their response to these charges. The District Court dismissed the entire suit for failure by all plaintiffs to state a claim for relief under U.S.C.A. Sec. 1983.

Issues: 1. Did the non-tenured faculty have a legal cause of action?
2. Did the faculty person alleging genre of tenure have a legal cause of action?

Decisions: 1. No
2. Yes.

Reasoning: (1) There is no mere conjecture that the possibility that subjective standards could mask an improperly grounded failure to renew. To bring themselves within section 1983, they must allege that the trustees' employing these criteria actually operated in some manner to deprive him of presently enjoyable First Amendment rights. The trustees'

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[94]Collins v. Wolfson, 498 F. 2d 1100 (1975).

> failure to renew the contracts was not any alleged wrongdoing, but simply that someone on the faculty had to go because of a necessary reduction in staff size. In fact, by definition, a reduction in force means that someone who otherwise would likely be invited to stay must be relieved. Employing admittedly general criteria or guidelines is thus confined to determining who among qualified instructors is more or less expendable, rather than deciding who on the faculty has so misbehaved as to warrant dismissal for cause. There is simply no "stigma" or "badge of infamy" associated with this sort of non-renewal. (2) The tenured faculty person should have been permitted by the court to establish entitlement to such a hearing, the purpose of which would be to assure that his position was in fact 'discontinued' within the meaning of the contract and, if he was instead the victim of a 'reduction in force,' that the trustees made their decision pursuant to their previously announced criteria.

In Busbee v. Georgia Conference A.A.U.P., the court held: Contracts which were entered into by Board of Regents and faculty members at institutions of university system after effective date of Act appropriating sum for salary increases for university system personnel but prior to the effective date of the appropriate Act amendment eliminating such funds for salary increases, after it became apparent that revenue estimate for fiscal year was excessive, and which contained no provisions that payments provided for were subject to reduction depending on availability of funds, were valid contracts and were binding on Board and any failure to make payment under such contracts would constitute a breach of contract.[95] The

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[95]Busbee v. Georgia Conference A.A.U.P., 221 S.E. 2d 437 (1975).

court further held that the Board of Regents of the University system of Georgia is a person in law, able to sue and be sued and that it does not have sovereign immunity in a suit for breach of the express terms of a contract which it is authorized to and has entered into. It also declares that the governor does not have statutory authority to enter into faculty employment contracts not to sue and be sued therein.

Facts: A suit for declaratory judgment instituted by and on behalf of certain faculty members at institutions of the University System of Georgia seeking an adjudication that certain employment contracts entered into by the Board of Regents of the University System of Georgia are valid and binding. The defendants are George Busbee, Governor, Johnnie L. Caldwell, Comptroller General, Gayden W. Hogan, Director of the Fiscal Division of the Department of Administrative Services and the Board of Regents of the University System of Georgia and its members. The trial court ruled in favor of the plaintiffs and the defendants appeal. The General Assembly met in regular session beginning in January 1975 and enacted an appropriations Act for the fiscal year commencing July 1, 1975, appropriating almost two billion dollars based on a revenue estimate of $1,823,000,000 plus. The Georgia Constitution prudently provides that the General Assembly shall not appropriate in any fiscal year more money than it expects to collect in revenue during the fiscal year plus that which it has on hand in revenue sharing funds. The appropriations Act for the fiscal year beginning in July 1, 1975 was approved by the Governor and became effective on April 25, 1975. It appropriated to the Regents, among other purposes, $223 million for personal services (salaries and wages) at its instructional institutions. In addition, that Act appropriated $11,500,000 for salary increases for University System personnel and approximately $44,500,000 for

salary increases for certain other state employees, such increases to commence September 1, 1975. Once the Governor approved the appropriations Act, the Board of Regents executed contracts with many faculty members increasing their 1975-1976 salaries over their 1974-1975 salaries by varying amounts. When the Governor realized that the revenue estimate for FY 1975-1976 was excessive, he called a special session of the General Assembly which met from June 23-July 3, 1975. The General Assembly amended the FY 1975-1976 appropriations Act by reducing it almost $125 million. Included in this reduction was the $56,000,000 state employee salary increase provisions, including the $11,510,000 to fund salaries. Plaintiffs are faculty members who received salary contracts between April 25, 1975, the effective date of the original FY 1975-1976 appropriations Act, and July 3, 1975, the effective date of the repeal of those increases. The Regents announced that the plaintiffs and other faculty members who received contracts containing salary increases will not be paid those increases but will be paid their 1974-1975 salaries.

Issues:
1. Did the Board of Regents breach the plaintiffs' contract for the 1975-1976 academic year?
2. Did the Amendments to the appropriations Acts which the General Assembly enacted, impair the obligation of plaintiffs' employment contracts?
3. Did the Regents' failure to honor the plaintiffs' contracts violate the equal protection clause of the Constitution of Georgia?

Decisions:
1. Yes.
2. No.
3. No need to decide.

Reasoning: (1) The court considering the merits noted that the faculty contract forms do not contain a provision to the effect that the payments provided for therein are subject to reduction depending upon the availability of funds as provided by the appropriations Act and Amendments thereto. The faculty employment contracts entered into between April 25 and July 3, 1975 are valid and binding upon Regents and

that nonpayment thereof according to their written salary terms constitute a breach of such contract. (2) No economic necessity vital to the interests of the people in the state has been sufficiently shown to invoke such power as the state may have to impair the obligation of its contract.

Dissenting Opinions: (Issue of Sovereign Immunity)

Justice Hall: 'A majority of this court has held that this litigation is controlled by the 1785 statute and its predecessor Acts relating to the old corporation known as the Regents of the University System of Georgia and that because of those Acts, the present department of State Government known as the Board of Regents of the University System of Georgia has no sovereign immunity. I conclude that the Board of Regents of the University System is a department of State Government with the same degree of sovereign immunity as any other department of State Government.'

A Central Virginia Community College teacher, who was non-tenured, applied for a multi-year contract and was denied the contract. He criticized the report which was the basis for the decision not to grant him tenure. His criticism was misinterpreted as threats to various college officials and he was dismissed. In Phillips v. Puryear, he won his suit when the federal district court held that he had been denied procedural due process prior to dismissal and was due his back pay. The court also held that no punitive damages would be assessed against the defendants.[96]

Facts: Plaintiff complains that his dismissal from his teaching position as an Associate Professor of Health, Physical Education and Recreation at CVCC violated his constitutional right to procedural due

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[96]Phillips v. Puryear, 403 F. Supp. 80 (1975).

process of law and freedom of speech.

Issues: 1. Was the college president impartial in plaintiff's adversary hearing?
2. Did plaintiff's dismissal violate his constitutional right to freedom of speech?

Decisions: 1. No.
2. Yes.

Reasoning: This is not a case in which plaintiff's contract was not renewed because of his failure to maintain good relations with fellow faculty members. In this case, plaintiff was dismissed in the middle of a school year, and branded a 'substantial threat to the welfare of the institution' solely on the basis of two brief conversations with fellow faculty members. The speech which resulted in these severe sanctions against plaintiff was a criticism of a report which had stigmatized him. There is no doubt that the plaintiff's rights under the Constitution allowed him to criticize the report of the Ad Hoc Committee and those persons who prepared it and it is further clear that this criticism as such could not be a basis for his dismissal and stigmatization. The court found that the plaintiff's statements to the two faculty persons were remarks and the later personal reactions could not make them threats. It should be noted that in relief in this case plaintiff was ordered reinstated in a teaching contract for the current school year because he was dismissed and stigmatized in violation of his constitutional rights.

On the basis of fraud, the court held, "damages recoverable in action against community college district board for negligent misrepresentation as to the source of funding for teacher position were damages for any injury which was the direct and natural consequence of fact that the teacher who was not told that position which he moved to Arizona from Alaska to accept, was specially

funded, they acted on the faith of the district board's representations and special funds ceased to be available" in Van Buren v. Pima Community College.[97]

> Facts: Husband and wife who resigned teaching positions in Alaska and moved to Arizona so that the husband could accept position there for the 1972-1973 school year brought action against community college district board, alleging that husband had not been told that his position, which was not renewed when special funds were no longer available, was dependent upon the existence of special funds. Superior Court awarded damages in amount of $3,000 and the plaintiff's appeal asserting that the damages were inadequate and that punitive damages should have been awarded.
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> Issue: Should the court award punitive damages?
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> Decision: No.
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> Reasoning: The trial court could have legitimately concluded that the losses allegedly incurred after the 1972-1973 school year were the result of the appellant's decision to remain in Arizona.

In Billmeyre v. Sacred Heart Hospital of the Sisters of Charity, Inc., an Instructor of Practical Nursing's contract was held to be automatically renewed in the absence of proper notice of non-renewal, even though the school was funded by a federal grant subject to the annual renewal.[98]

> Facts: Action for breach of an employment contract. The Circuit Court rendered judgment for the defendant hospital and the plaintiff appealed. The Court of

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[97] Van Buren v. Pima Community College District, 540 P. 2d 763 (1975).

[98] Billmeyre v. Sacred Heart Hospital of the Sisters of Charity, Inc., 331 A. 2d 313 (1975).

Appeals held that there was testimony that the hospital's School of Practical Nursing had been furnished by federal grants routed through the State Department of Education, and that funding was for a one-year period and renewed annually, the letter agreement whereby either party could terminate the employment contract at the end of the school year by giving notice in writing to the other not later than May 1 of such year was not tailored to meet realities of supportive program and, absent an ambiguity, could only be read as meaning that the contract was automatically renewed for a second year in the absence of notice. The plaintiff's conduct, in whatever its form could not be said to have justified her dismissal, as permitted by contract, in accordance with the hospital's personnel policy, in the absence of evidence that an effort was made to terminate the plaintiff's employment in a manner contemplated by policy. Plaintiff seeks to recover $10,037.48 in damages for breach of contract. By letter agreement dated 15 October, 1972, Mrs. Billmeyre was employed as a Coordinator-Instructor in the hospital's School of Practical Nursing.

Mrs. Billmeyre was on a 30-day leave of absence for surgery in April-May, 1973, and on her return received a letter written on 13 May from Sr. Mary Agnes, the hospital's Director of Nursing Services which indicated that Sister did not think it wise for Mrs. Billmeyre to continue in the Practical Nursing Program. The principal thrust of Mrs. Billmeyre's argument is that the contract must be construed as renewing itself for another year in the absence of notice from either party prior to 1 May.

Issue: Is the contract ambiguous?

Decision: No.

Reasoning: The court indicated that the hospital's School of Practical Nursing had been funded by federal grants, routed through the State Department of Education, and that funding was for one-year periods and renewed annually. The difficulty with the letter agreement was that it was not tailored to meet the realities of the supportive program. To make it fit would require us to write a new contract

for the parties, which we cannot do.

Where the probationary period for Associate Professor was three years, at the beginning of the plaintiff's full third year as Associate Professor of History he was notified that he would be employed for the fourth year but he was specifically informed that the letter of rehiring was not a notification of tenure and prior to completion of his third full year he was notified that he would not be granted tenure and that his employment would be terminated at the close of his fourth year. Re-employment for the fourth year did not work an automatic grant of tenure, and hence, the Professor complaining of the wrongful termination, had no property right to continued employment, was the holding in Kilcoyne v. Morgan.[99]

> Facts: Associate Professor of History brought suit against the University Board of Trustees and others to recover for alleged wrongful termination of employment. Both sides moved for summary judgment. The District Court held that where the probationary period for Associate Professors was three years, at the beginning of the plaintiff's full third year he was notified of continued employment for the fourth year but was specifically informed that the letter rehiring was not a notification of tenure and prior to the completion of his third full year, he was notified that he would not be granted tenure and that his employment would be terminated at the close of the fourth year, re-employment for the fourth year did not work an automatic grant of tenure and, hence, the plaintiff had no property right to continued employment.

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[99]Kilcoyne v. Morgan, 405 F. Supp. 828 (1975).

Issue: Did the plaintiff acquire tenure?

Decision: No.

Reasoning: Plaintiff had clearly not completed the probationary period requisite to receiving tenure when he was notified of his dismissal. There is no provision in the Faculty Manual that no faculty member can be employed without tenure beyond the expiration of his probationary period. Paragraph G of Section I of the Appendix B states: 'Appointments without tenure are probationary.' The plaintiff, therefore, has never had tenure and has no property right. The court further found no requirement in the Faculty Manual to continued employment.

In Green v. Richmond, the following concept of the law of contract was held: where there is no conflicting evidence as to the terms of the oral contracts, construction of those terms is a matter of law for the judge rather than the jury.[100]

Facts: An action in the nature of quantum meritum against the personal representative of the estate of decedent to recover for services rendered by the plaintiff in reliance on the decedent's oral promise to leave a will bequeathing his entire estate to her. The Superior Court entered judgment for plaintiff and defendant appeals.

Issues:
1. Was the oral agreement illegal on the theory that it included sexual intercourse or cohabitation as part of the consideration?
2. Should a preliminary showing of reliability have been required before the amount of inventory?

Decisions:
1. No.
2. Yes.

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[100]Green v. Richmond, 337 N.E. 2d 691 (1975).

Reasoning: (1) The oral agreement involved a promise to make a will, and as such was not binding. However, if the oral agreement was legal and not contrary to public policy, the plaintiff could recover the fair value of her services. From the totality of the evidence, the jury was warranted in inferring that the illicit relations were not part of the plaintiff's performance. (2) The value of the estate is relevant. The court indicated that at the same time it recognized the great potentiality for unfair prejudices even if the value of the estate were accurately shown. The likelihood of irremediable unfair prejudice would be greatly increased if the value of the estate was substantially overstated. A preliminary showing of reliability was required before the amount of the inventory, which may or may not have been reflective of the value of the estate, was disclosed to the jury. While in most cases the requirement of fairness would be met by the fact that the defendant had the opportunity to prevent rebuttal evidence. This is not the case here.

Plaintiff Blouin, in Blouin v. Loyola University claimed that his First and Fourteenth Amendment rights were infringed upon when defendant did not renew his teaching contract. The issue in this case was were various alleged state involvements by the university sufficient to support a finding of "state action." The court held that the alleged state involvements by the university were insufficient to support a finding of "state action" and therefore the court did not have jurisdiction under Civil Rights laws.[101]

Facts: Appellant brought suit for damages against Loyola University (Loyola) and certain of its officials, claiming that his First Amendment right of free speech and Fourteenth Amendment right of

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[101]Blouin v. Loyola University, 506 F. 2d 20 (1975).

due process had been infringed when the defendant university refused to renew his teaching contract. The district court granted Loyola's motion for summary judgment and dismissed the suit on the basis that Loyola was not clothed with state action and that the court had no jurisdiction under 28 U.S.C. 1331. Appellant alleges certain facts which he contends result in the requisite "state action." He asserts that Loyola is the sole owner and operator of a radio station and a television station which are licensed under the Federal Communications Act of 1934 and are subject to its regulatory provisions. Additionally, appellant points out that Loyola, as a private, non-profit corporation, enjoys certain federal and state tax exemptions. He claims that it receives substantial federal and state monies in the form of grants, subsidies, student scholarships, and loans. Appellant suggests that a finding of state action would be justified by the fact that Loyola is a corporation organized and incorporated under the laws of the State of Louisiana.

Issue: Were appellant's rights to due process and free speech infringed upon when his contract was not renewed?

Decision: No.

Reasoning: Although university, against which teacher brought suit, claiming university refused to renew his contract, owned and operated a radio station and television station which were licensed under Federal Communications Act, although the university as a private, non-profit corporation, enjoyed federal and state tax exemptions, although it received federal and state money, and although it was organized and incorporated under Louisiana law, those factors were not of the nature, kind or degree necessary to support a finding of "state action," and federal jurisdiction did not exist. The licensing of an otherwise private entity by the government does not, of itself, require a finding of state action. Furthermore, the record does not disclose any "nexus" between the alleged unconstitutional

> activity and the purported federal and state government involvement. Accordingly, the order of the district court dismissing the complaint is affirmed.

Where a letter which was sent by the chairperson of the Department of Otolaryngology at the Medical School to a physician, concerning the possibility of the physician joining the staff of the medical school made reference to the "Promotion and Appointment Committee" which would have to approve any hiring suggested by the chairperson, the "best offer" made in the letter from the chairperson was not the type of an offer which the physician could accept in such a manner as to form a binding contract, but rather it was merely a recommendation which the chairperson would pass along to the appropriate committee, was the rule of law in Jacobsen v. Leonard.[102]

> Facts: In the fall of 1971, the plaintiff received a telephone call from Dr. Leonard, chairperson of the Department of Otolaryngology at Jefferson, regarding the plaintiff's availability to join the staff of Jefferson, in that department. Plaintiff who was a citizen of the State of Colorado, expressed interest in the position. By a subsequent letter, he made arrangements to visit the Jefferson facilities in Philadelphia on December 18-21, 1971. He was to meet personally with Dr. Leonard. The visit subsequently took place during which time the plaintiff and Dr. Leonard discussed the particulars of the position, the salary range, academic title and general hiring and promotional policies at Jefferson. On December 29, 1971, Dr. Leonard wrote the plaintiff and offered him the position of Chief of Audiology

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[102] Jacobsen v. Leonard, 406 F. Supp. 515 (1976).

and Assistant Director of the Hearing and Speech Center at the rank of Assistant Professor. The starting salary was to be $18,000 per year. Plaintiff in his reply letter expressed disappointment with Dr. Leonard's offer and stated that he desired not only to begin as the Chief of Audiology, but also as the director of the Hearing and Speech Center and at the Associate Professor level. Dr. Leonard then offered the plaintiff, by a letter dated January 13, 1972, the same position and starting salary as stated in the December 29th offer but at the higher rank of Associate Professor, and the opportunity to become the director of the Hearing and Speech Center at a later time if plaintiff's interim performance was satisfactory. On January 18, 1972, plaintiff accepted Dr. Leonard's latest offer and proceeded to make arrangements to move to Philadelphia, which included the sale of his house and termination of his employment in Colorado. By letter dated January 31, 1972, Dr. Leonard rescinded his offer for the reasons that the majority of the staff of the Hearing and Speech Center opposed plaintiff's joining the staff under the terms contained in the January 13, 1972, letter, and that the rank and promotion steps contained in that letter would find little support at the level of the office of the Dean of the medical school.

Issue: Did the court err in not granting a motion for directed verdict?

Decision: Yes.

Reasoning: There is no question that Dr. Leonard did not have expressed or implied authority to enter into binding employment contracts on behalf of Jefferson. The plaintiff did not attempt to prove his case on the merits of such authority. Plaintiff did, however, contend and attempt to prove thoughout the trial that Dr. Leonard had apparent authority to enter a binding employment contract. While it may be true that the plaintiff subjectively believed that it was not possible for the appointment committee to turn him down, he is nevertheless charged with the knowledge that Dr. Leonard did not possess final hiring authority. Thus, it held that the plaintiff had knowledge that further steps of approval were required before hiring. In light of this knowledge,

plaintiff could not have relied in good faith upon the apparent authority of Dr. Leonard.

Re-appointment in a non-tenured status, or back pay in lieu of re-appointment, was the appropriate remedy for failure to give timely notice of re-appointment to a non-tenured instructor who had been employed by the university for more than two years was held in Simon v. Boyer.[103]

> Facts: Petitioner was employed as an instructor in the Department of Physical Education for Men at the State University of New York at Buffalo from 1965 to 1969. On July 1, 1969, he was appointed to the position of assistant professor of physical education and served in that capacity until June 1972. In the summer of 1971, just prior to the commencement of petitioner's seventh year of university service, his employment record was reviewed by the President's Board on Faculty Promotion and Tenure which recommended to the Chancellor of the State University that petitioner be denied tenured status and that his employment be terminated at the end of the next academic year. Because petitioner had been employed by the university for more than two years, he was entitled to twelve months' notice that he was not to be reappointed, but such notice was not given petitioner until December 21, 1971. Petitioner thereupon commenced a grievance proceeding under the collective bargaining agreement in effect between the university and its professional employees, contending that because he was not timely notified of his termination he was entitled to be reappointed for another full academic year commencing in September 1972 and that such reappointment must carry with it an automatic conferral of tenure under 8 NYCRR 355.4(b). The grievance proceeding culminated in arbitration, under a broad stipulation of power in the arbitrator, and an award was made directing that petitioner be reappointed for an additional academic year but without tenured status. Throughout these grievance proceedings petitioner urged that under the terms of the collective bargining agreement and the stipulation

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[103]Simon v. Boyer, 380 N.Y.S. 2d 178 (1976).

the arbitrator was empowered to award him tenure as an appropriate remedy. Petitioner commenced this proceeding as an action for declaratory judgment seeking a determination that the arbitrator was without power to grant him tenure under the collective bargaining agreement and ordering that tenure be conferred upon him notwithstanding the arbitrator's award.

Issue: Should tenure be conferred under his contract?

Decision: No.

Reasoning: Reappointment in non-tenured status, or back pay in lieu of reappointment, is the appropriate remedy for failure to give timely notice of reappointment in this situation. Petitioner's appointment for an additional year did not grant him tenure rights. Tenure may not be conferred by a back-door maneuver. Furthermore, by attempting to enforce provisions of the collective bargaining agreement so as to confer power upon the arbitrator to award tenure, petitioner elected his remedy and cannot later be heard to repudiate the same terms and contend that such power was not conferred. For purposes of the doctrine of election of remedies, inconsistent remedies are those which proceed on opposite and irreconcilable claims of rights. The test is whether the facts necessary to support one remedy are consistent with the facts necessary to support the other.

A community college teacher whose employment was terminated because of her exercise of First Amendment rights of free speech and free press was entitled to specific performance even though her contract was one for personal services was the holding in Endress v. Brookdale Community College.[104]

Facts: Plaintiff is a discharged community college teacher who had served as a faculty advisor to the

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[104]Endress v. Brookdale Community College 364 A. 2d 1080 (1976).

college's student newspaper. She brought a civil rights action against the college and its president and members of the Board of Trustees. Plaintiff wrote an editorial which appeared in the April 26, 1974 edition of the Stall, the student newspaper of which she was the faculty advisor. It accused the chairman of the Board of Trustees of a conflict of interest in allegedly "making a deal" whereby his nephew's company received a contract from the college for the furnishing of audio-visual equipment. The president in recommending plaintiff's dismissal asserted as the alleged causes for such action, her violation of "both the tradition established under board policy and the philosophical platform and goals of the college as the same pertain to freedom of the press and student responsibility for the college newspaper," and of the "editorial prerogative of the student editor and the student staff," in ordering and directing the editor of the newspaper "to publish certain material without his approval" and "in causing the publication of libelous material contrary to accepted journalistic standards." The Superior Court, Chancery Division, entered judgment in favor of the plaintiff and awarded compensatory and punitive damages and attorneys' fees and defendant appealed.

Issues:
1. Did the evidence sustain finding that the teacher had been terminated for exercise of First Amendment rights?
2. Should college officials have known that termination for that reason violated the teacher's First Amendment rights so that qualified immunity could not be asserted?
3. Could college officials assert qualified immunity with respect to the contention that they should have known that termination without a hearing violated due process rights of the teacher?
4. Could punitive damages be awarded against the president?
5. Were the compensatory damages excessive?

Decisions:
1. Yes.
2. No.
3. No.
4. Yes.
5. Yes.

Reasoning: (1) The court found that there is no proof in this case that the plaintiff's activities led to a material or substantial disruption of class work or to a substantial disorder or to the invasion of the rights of others. The court said it "perceived no countervailing public interest which would justify a restriction of plaintiff's First Amendment activity." (2) Lack of intent on the individual defendant's part (except President Smith) to violate plaintiff's constitutional rights would not necessarily be a defense, if they should have known that their conduct would have that effect. The court said that it cannot be said that the individual defendant reasonably should have known then that their action would violate a clearly established constitutional right of plaintiff to a procedural due process, i.e., the right to a hearing. (3) The court pointed out that careless disregard or negligent ignorance of clear, well established constitutional rights will not insulate the defendants from liability. The sum of $2,500.00 as punitive damages in the case of President Smith is a sufficient penalty to impose upon him for his wrongful conduct and as a deterrant against such action in the future. Punitive damages are "allowed to punish the wrongdoer for a willful act and to vindicate the rights of a party in substitution for personal revenge thus safeguarding the public peace." Taking into accord the absence of proof of any significant emotional effect upon the plaintiff as the result of the action taken and considering factors referred to above, the sum of $2,500.00 will fairly and adequately compensate her for the deprivation of her civil rights.

Under the circumstances in Anapol v. The University of Delaware, the court held that a college professor's confession of forgery did not eliminate the necessity for pre-termination procedural protections.[105]

Facts: Plaintiff was employed by defendant from 1960 through December of 1975. In the fall of 1974, he attained the rank of Associate Professor. At this time, he submitted a dossier to the Promotion and

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[105]Anapol v. University of Delaware, 412 F. Supp. 675 (1976).

Tenure Committee of his department in support of his application for promotion to rank of Full Professor. Among the publications in Dr. Anapol's dossier was a photocopy of an article written by him for a publication called the Barrister. The masthead at the top of the first page of this article contained the heading "Trial Lawyers Association" beneath its title logo. The application for promotion was not granted. During the fall of 1975, plaintiff Anapol again submitted his dossier for promotion and this time periodic faculty evaluation. The dossier again contained the article in Barrister, but this time the volume number and date were missing. Investigation proved that plaintiff had forged a letter, purportedly from a Philadelphia attorney, praising the Barrister. It was also found that Dr. Anapol had not been candid when questioned in the course of this investigation by his department chairman. Dr. Berten (Department Chairman) set forth these conclusions in a memo. The ultimate result was that, effective December 31, 1975, Dr. Anapol was terminated for cause pursuant to a December 17, 1975 letter of Dean Gouldner (falsification of documents). Dr. Anapol sued and his motion for a temporary restraining order was denied on December 29, 1975. The motion for preliminary injunction was merged with the merit of Dr. Anapol's procedural due process claim and this case was tried in the court on January 23, 1976.

Issue: Whether the Due Process Clause guaranteed to Dr. Anapol procedural safeguards which he was not awarded?

Decision: Yes.

Reasoning: Dr. Anapol was not accorded the pre-termination procedural due process to which he was entitled. He must be reinstated with back pay. This does not mean the university cannot hereafter terminate Dr. Anapol's employment based on the events which gave rise to this litigation, provided adequate procedural safeguards are afforded him. If such charges are reinstated against him and processed with reasonable alacrity, the university if it determines suspension to be in its best interest, need not return Dr. Anapol to the classroom or campus pending final disposition of those charges.

What is of interest to this research is the fact that the court in its decision went on to point out the reason that it could not honor a plea of the defendant in relation to the collective bargaining agreement was due to the ambiguous terms of the contract.

Implicit in Skehan v. Board of Trustees of Bloomsberg State College, was the rationale that termination of a contract is an event which solidifies positions in the inference that a professor, after notification of the opportunity to prepare and fully present his side of the case prior to that event. Skehan's minimum requirements at the pre-termination stage:

(1) clear notice of the charges being considered;

(2) a reasonable time interval to marshall facts and evidence;

(3) an explanation of the substance of the evidence supporting the charges, and

(4) an opportunity to present his side of the case in a manner which will permit the decision maker to weigh both sides.[106]

Facts: Plaintiff was terminated during his contract term on the grounds that he had failed to fulfill his "classroom obligations" and "had flagrantly, wilfully and maliciously disrupted the instructional program." He was notified in writing of those charges by the president of the college on October 9, 1970, and given

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[106]Skehan v. Board of Trustees of Bloomsberg State College, 538, F. 2d 53 (1976).

an opportunity to respond in writing within five days. On October 23, 1970, the Trustees terminated his employment effective October 17. On December 1, 1970, the Committee on Academic Affairs was convened to hold a hearing concerning dismissal. The court held that the professor was entitled to a pre-termination hearing and that the December 1 post-termination hearing did not meet the requirements of due process. Judgment for plaintiff with minimal damages, plaintiff appeals. Remanded from the Supreme Court to the United States Court of Appeals for an opinion.

Issue: Is the plaintiff entitled to an award of attorney's fees under the theory that he had acted as a "private attorney general"?

Decision: Dependent on Facts--Case Remanded.

Reasoning: The theory upon which it was suggested that the district court could award attorneys' fees--the private attorney general theory--has been foreclosed by Alaska Pipeline Service Company v. Wilderness Society and the obduracy ground was not previously considered. We reward this aspect of the case to the district court for additional findings on the obduracy issue. The court went on to vacate its prior judgment and that of the district court and remanded the case for finding of fact. The court clearly indicated that if Skehan's only contract right expired by its term at the end of the 1970-1971 academic year, and there was no First Amendment violation, a back pay award against the individual defendants, covering the 1970-1971 period, must be considered.

Reassignment of the college president's assistant for community affairs to the position of "Acting Associate, Office of the Vice President for Planning and Development" was within the District of Columbia's Board of Higher Education's discretion to assign duties to such person under employment contract which required him to perform all duties assigned to him by the president or the board was a legal

determination in Robertson v. District of Columbia Board Board of Higher Education.[107]

Facts: Appellant was employed at Federal City College (FCC) from July 1970 to June 30, 1973. On June 9, 1972, he entered into a one year employment contract with Appellee Board of Higher Education, signed by the president of FCC. The contract was to serve as the Assistant to the President for Community Affairs. It was to begin on July 1, 1972 and to terminate on June 30, 1973. On July 28, 1972, the president of FCC was relieved of his duties and Dr. Elgy Johnson was later named acting president. The employment contract incorporated a memorandum of understanding which permitted the president of FCC to terminate or modify the contract for acts detrimental to FCC, but only "in accordance with established policies and procedures of the Board of Higher Education." Appellant agreed in the contract to "undertake and perform those duties assigned to him by the President or the Board of Higher Education." Suit was brought by the Appellant against the District of Columbia Board of Higher Education for equitable relief and actual, compensatory and punitive damages on theory that the board had breached plaintiff's one year employment contract to serve as college president's assistant for community affairs by withholding paychecks, by reassigning him to the position of "Acting Associate, Office of the Vice President for Planning and Development," by willfully and maliciously denying him a step increase in salary, and by willfully and maliciously failing to renew his contract. The Superior Court awarded plaintiff the amount of one withheld check, but otherwise found in favor of the defendant. Plaintiff appealed.

Issue: Did appellant prove a breach of his employment contract?

Decision: No.

Reasoning: The appellant did not establish either a breach of his employment contract or an intentional tort or constitutional deprivation on the part of the appellees. Each event appellant argues to be an adverse action is authorized or allowed under the terms of the

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[107] Robertson v. District of Columbia Board of Higher Education, 359 A. 2d 28 (1976).

> contract itself either expressly or impliedly. Appellant agreed in the contract to perform all duties assigned to him by the president or the board. Reassignment of appellant from his position as assistant to the president thus falls within appellees' discretion to assign duties to appellant. The contract did not provide for step increases or automatic renewal. Appellees agreed to pay appellant a fixed salary for his one year contract, which was done, and appellees agreed to give appellant 90 days' notice of nonrenewal of his contract, which also was done. Appellees' actions in these respects did not breach their contract with appellant, but rather were in accord with that contract.

In the case of Bruce v. the Board of Regents for the Northwest Missouri State University, the court ruled that a non-tenured state university faculty member, who had a written contract which provided for sabbatical leave and required him to serve at least two more years on faculty, had a legitimate claim of entitlement to benefit of his sabbatical leave contract. This benefit constituted a "property interest" within the meaning of procedural due process clause of the Fourteenth Amendment. Therefore, Bruce had a constitutional right to a hearing to provide him with the opportunity to vindicate his claim to that interest.[108]

> Facts: Plaintiff, from September 1966 through the 1970-1971 academic year, held a one year employment contract as an instructor in the Speech Department at Northwest Missouri State University. In September of 1969, plaintiff applied for a sabbatical leave to work on his Ph.D. during the 1971-1972 academic year. On September 8, 1970, the defendant

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[108] Bruce v. Board of Regents for Northwest Missouri State University, 414 F. Supp. 559 (1976).

Foster wrote plaintiff advising him that the defendant Board approved plaintiff's request for a sabbatical leave for the 1971-1972 academic year with leave pay of $4,500 for the purpose of permitting plaintiff to continue his education toward the degree of Ph.D. at the University of Nebraska. The university regarded the documents and resolution concerning plaintiff's sabbatical leave as a 'sabbatical contract.' In October 1969, plaintiff was made Acting Chairman of the Speech Department and in November 1969, he was promoted to Assistant Professor effective February 1, 1970. Robert Bohlken, the new chairman of plaintiff's department, polled the tenured members of the department and received a unanimous vote in favor of recommending plaintiff for tenure. Chairman Bohlken endorsed this recommendation in a letter sent to the Dean of Faculties on September 21, 1970. Interim, Bohlken and plaintiff had strong differences of opinions. In October 1970, Bohlken obtained a return of the tenure recommendation he forwarded to Dr. Small on September 21, 1970. He also prevailed on Dr. Folsom, another member of the department to change his vote. He then placed himself in a position to break a tie vote, did so, and advised Dr. Small on October 20, 1970 of the result of the "second" tenure vote. A "second" tenure vote was not provided for in the Handbook. He did not give plaintiff written notice that he recommended that plaintiff should not receive tenure. By November 12, 1970, the faculty in-fighting was so bad that Bohlken formally requested Bruce's termination effective June 1971. The defendants approved the "second" tenure vote and voted not to renew Bruce's contract effective May 14, 1971. This vote was amended to read effective December 22, 1971. The Board also resolved in the same November 23, 1971 resolution that it rescinded the leave of absence granted Bruce for the 1971-1972 academic year.

Issue: Did plaintiff have a legal right to procedural due process in regard to his sabbatical leave contract?

Decision: Yes.

Reasoning: The court held the test for determining whether a person's interest in a benefit must be considered a "property" interest within the meaning of the Fourteenth Amendment by stating that:

> A person's interest in a benefit is a property interest for due process purposes if there are such rules of mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. Controlling guidance in how to apply the test is stated as follows:
>
> > A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless "sufficient" cause is shown. Yet absence of such an explicit contractual provision may not always foreclose the possibility that the teacher has a property intrest in re-employment. Roth (408 U.S. 601).

In Goodyear v. Junior College District of St. Louis, the court applied basic concepts of the law of contract when it held: "when an individual seeks to work for a school district without complying with requirements of statute requiring all contacts to be in writing, he does so at his own risk." In interpreting statutory requirements the court further said: 'requirements of a statute requiring school districts to make all contracts in writing are mandatory and not merely directory.[109]

> Facts: Plaintiff sued defendant to recover in quantum meruit for services performed for the school district. Plaintiff did not have a written contract. The Circuit Court of the City of St. Louis dismissed the actions and plaintiff appealed.

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[109] Goodyear v. Junior College Dist. of St. Louis, 540 S.W. 2d 621 (1976).

Issue: Does plaintiff have a course of action in quantum meruit?

Decision: No.

Reasoning: The court quoted Section 432-070, R.S.MO 1969 which states 'No school district--shall make any contract--unless the same--shall be in writing.' It held that the requirements of this statute are mandatory and not merely directory. Therefore, the court reasoned 'that the statute requiring all contracts with school districts to be in writing precluded recovery against school district on quantum meruit or any theory of implied contract: and that plaintiff could not recover even though school districts are authorized by statute to sue and be sued. The court went on to indicate that by statute, a County Board of Education in North Carolina may terminate the employment of a teacher at the end of the school year without filing charges or giving its reasons for such termination, or granting this teacher an opportunity to be heard. A contract of employemnt which contains no provisions for the duration or termination of employment is terminable at the will of either party, irrespective of the quality of performances by the other party.[110]

Due process rights of a tenured faculty person, when the faculty person initially breaches his contract of employment was defined in Kalme v. West Virginia Board of Regents:

When a state college president's letter informed tenured professor that the reason for his termination was his violation of contractual agreements to perform assigned teaching responsibilities, professor knew of his right to a hearing and immediately exercised it, proceedings of faculty hearing committee cooperated in all respects with requirements of due process, and professor's termination and loss of tenure were ratified by hearing panel and reaffirmed by Board of Regents, 'dismissal' of professor satisfied due process requirements.[111]

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[110] Still v. Lanu, 182 S.E. 2d 403 (1971).

[111] Kalme v. West Virginia Board of Regents 539 F. 2d 1346 (1976)

Facts: Professor Kalme sued the West Virginia Board of Regents and the president of West Virginia State College, contending that he was deprived of a tenured professorship without due process of law. Summary judgment was awarded defendant--plaintiff appeals. During the 1972-1973 academic year Kalme was on leave of absence from the college in order to complete research for his doctoral thesis. During this time he taught at Inter-American University in Puerto Rico. West Virginia State officials heard nothing from Kalme so that on March 6, 1973, the Dean of Instruction wrote to Kalme inquiring what his intentions were. On March 16, having no reply, the Dean wrote again, enclosing a copy of his March 6th letter. He emphasized that the college had to know Kalme's plans in order to make personnel decisions. This letter crossed in the mail with Kalme's letter of March 15th which indicated that he intended to return to West Virginia State for the fall semester of the 1973-1974 school year. Interim correspondence followed regarding Kalme's progress toward his doctoral degree. On March 1, 1973, Kalme was assured of reappointment to Inter-American University and he accepted and returned this contract on May 31st. On June 16th Kalme also signed and returned a contract offered by West Virginia State for the same 1973-1974 school year. Both colleges were kept conveniently ignorant of Kalme's conflicting contractual obligations. Kalme failed to appear at West Virginia State to resume his teaching duties there. The day classes began, August 30, 1973, the president of the college received a letter from Kalme in which he requested an extension of his leave of absence in order to complete his doctorate at the University of Ottawa; this letter made no reference to his teaching contract. A check at Ottawa revealed Kalme was not a full time resident nor had his thesis topic been officially accepted. On September 4th, the president responded to Kalme that the school "no longer considers you in the employment of West Virginia State College or in an official leave capacity." At a faculty hearing held on December 14th, with Kalme and his attorney present, the president's decision was affirmed. After the Board of Regents declined to reinstate him, Kalme filed suit.

Issue: Did plaintiff violate his contract of employment?

Decision: Yes.

Reasoning: The Constitution protects individuals against deprivation by the State of their liberty or property without due process of law. The employment rights of a tenured professor constitute a sufficient 'property interest' to warrant due process protection. Kalme intentionally and flagrantly violated his contract of employment with the college, and it was upon this contractual relationship that any property interest depended.

A community college president's power to accept an assistant professor's resignation was incidental to his delegated powers from the Board of Trustees to hire, promote and dismiss employees was a maxim of law set forth in Carroll v. Onondaga Community College.[112] The court further decided that where there was any doubt in an assistant professor's mind as to whether her resignation had been accepted was resolved by unequivocal statements in community college president's letter which was received by her before she attempted to withdraw her resignation, the assistant professor's resignation was accepted by the president and his acceptance was conveyed to her in a language sufficiently clear to be understood by her before she asked that the resignation be withdrawn.[113]

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[112]Carroll v. Onondaga Community College, 384 N.Y.S. 323 (1976).

[113]Carroll v. Onondaga Community College.

Facts: The petitioner resigned by a letter dated April 16, 1975, as an assistant professor at Onondaga Community College. Her resignation was accepted by the president. He conveyed his acceptance to her in a language sufficiently clear to be understood by her, before she asked that the resignation be withdrawn. The president accepted her resignation in a letter dated April 22, 1975, and a second one dated May 14, 1975. Both letters were received by petitioner before she attempted to withdraw her resignation.

Issue: Did the president have the power to accept petitioner's resignation?

Decision: Yes.

Reasoning: The court reasoned that the Board of Trustees had the power to delegate the authority to the president to hire, promote and dismiss employees. The evidence establishes that it did so by resolution September 24, 1965 and that the power to accept petitioner's resignation was incidental to this power.

In Vallejo v. Jamestown College, the court ruled that the measure of damages for breach of contract is the amount which will compensate party aggrieved for all detriment proximately caused thereby or which in the ordinary course of things would be likely to resolve therefrom; person injured is, as far as it is possible to do so by monetary award, to be placed in position he would have been in, had contract been performed.[114]

Facts: Vallejo was employed by defendant as an instructor and acting chairman of the Department of Modern Foreign Languages. On December 15, 1972, he was offered a contract for the nine month period beginning September 1, 1973. On December 15, 1973, Vallejo was advised that "because of financial

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[114]Vallejo v. Jamestown College, 244 N.W. 2d 75 (1976).

exigencies and/or low enrollments in the academic area for which you have had a responsibility," he would not be offered a contract for the 1974-1975 academic year. The college claimed that this action was taken at the discretion of the Board of Trustees of the college because the college was in a poor financial position, and that the overall staff reduction and consolidation scheme, of which Vallejo's non-renewal was only a part, would result in a saving of funds. Vallejo claimed his contract was not renewed because of clashes with administration over academic matters. He claimed he was denied his academic freedom as provided for in the faculty manual and has been separated from his position without due process of law, and that the failure of the college to follow the provisions of the faculty handbook is a breach of the contract between himself and the college. Vallejo states that he was fired and his academic freedom violated because of his failure to change a student's grade, because of his criticism of the Board programs, and because, as the administration claimed, "he failed to support the college." Vallejo holds that the 'Statement of Academic Freedom' is part of the contract of employment.

Issues: 1. Whether or not there was sufficient evidence to sustain the verdict of the jury?
2. Were damages excessive?

Decisions: 1. Yes.
2. Yes.

Reasoning: (1) After examining the evidence, the court held there is sufficient evidence to sustain the verdict of the jury. (2) The court quoted the North Dakota Legislature through Sec. 32-03-09, North Dakota Century Code, which has set out the measure of damages for breach of contract:

> For the breach of an obligation arising from contract, the measure of damages, except when otherwise expressly provided by the law of this state, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby or which in the ordinary course of things would be likely to

> result therefrom. No damages can be recovered from a breach of contract if they are not clearly ascertainable in both their nature and origin.

This statutory provision is in effect the adoption of the common law.

Dissent: (Justice Vogel):

> Here we are dealing with damages affecting the career of a professional man for years to come. In such an area, the range of permissible verdicts is much wider, and we should be most reluctant to second-guess juries, prove damages to his professional future because of the nonrenewal of his teaching contract, but the trial court did not allow him to do so. He made an offer of proof that he was unable to obtain employment in any of the fifty or eighty colleges he applied to, that his unemployability in any college was due, in his opinion, to the wrongful non-renewal, and that he was thereby damaged in the sum of $10,000. to $12,000. I believe this offer of proof was proper.

In the University of Colorado v. Silverman, the court held that a letter from an Associate Dean to an assistant professor which advised her that her current employment was for a one year period and that her reappointment was subject to certain prerequisites and did not constitute an offer of employment by the agent of the Board of Regents which thereafter ripened into a contract binding on the Board of Regents upon satisfaction of the stated conditions, since no contract could come into being without affirmative action by the Board of Regents itself.[115]

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[115] University of Colorado v. Silverman, 555 P. 2d 115 (1976).

Facts: The university employed respondent to teach for the 1972-1973 academic year. In December 1972, she received a letter from an Associate Dean, advising her that her current employment was for a one-year period and the reappointment was subject to two conditions: (1) The renewal of a grant under which she was hired; and (2) Evidence of competence and recommendation from the program area and division faculty peers that she be continued in her present position. Respondent was notified, however, by letter dated February 14, 1973, that she would not be reappointed. She was told that the school desired to open the position to other applicants. The same letter stated, "your work has been quite satisfactory and we are sure the committee would welcome the resubmission of your papers." This notification of nonreappointment complied with the standard set forth in the University of Colorado Faculty Handbook 1970 in effect at the time of this controversy. Respondent then filed a grievance with the faculty committee on privilege and tenure. The committee recommended to the university president that respondent be reappointed. The president did not respond, nor did he submit the recommendation to the Board of Regents. Respondent was not rehired. As a result, in December 1973, she commenced an action in Boulder County district court. She alleged five causes of action: breach of contract, estoppel, and deprivation of property without due process of law. Upon petitioner's motion, the trial court dismissed the action. The court of appeals reversed and remanded the case for trial. Respondent's contract claim was essentially that a binding contract or re-employment arose when the two conditions prerequisite to reappointment, as set forth in the December 1972 letter from the Associate Dean, were satisfied; and that the university breached this contract when it advised respondent of her nonreappointment by the February 1973 letter.

Issues:
1. Is the hiring authority of the Board of Regents delegable?
2. May estoppel be invoked against the university?
3. Did the university president's failure to transmit the recommendation of the faculty committee to the Board of Regents deprive respondent of property without due process of law?

Decisions: 1. No.
2. No.
3. No.

Reasoning: (1) The power to hire teachers involves considerable judgment and discretion, whether at the university or high school level. Absent legislative authorization, the Board of Regents' hiring authority cannot be delegated. (2) The court pointed out that the doctrine of estoppel is not favored. There is no 'manifest and injustice' requiring the invocation of the estoppel doctrine. Respondent received adequate notice of the Regents' decision not to retain her. She was, in fact, notified well before the March 1 deadline set by the university's Faculty Handbook 1970. The Regents' decision not to rehire her made within their statutory authority, cannot be considered manifestly unjust. (3) The respondent's right to have the procedural regulations strictly followed is a right without substance, and to remand for the purpose of ordering a transmittal of the committee's recommendation by the President to the Board of Regents would be an exercise in futility. This is so because the recommendations of the committee on privilege and tenure are advisory only, as they must be in light of the Board of Regents' exclusive hiring authority under the statute.

Groves, Justice (dissenting):

> I dissent because I agree with the court of appeals in its conclusion that the statute did not preclude delegation of authority by the Board of Regents. I further agree with the court of appeals in its conclusion as to estoppel based upon reliance. I concur with the majority opinion here as to the question of estoppel predicated upon manifest injustice and the question of due process.

Shaw v. Board of Trustees held that the fact that two college teachers, who were division chairmen, were subjected to a June 30th deadline for submitting a letter of contrition in connection with violation of policy

manual while other faculty members had until August did not work a denial of equal protection since the chairmen were classified as "twelve month administrators" whose new contract year commenced on July 1st, while the others were not.[116]

> Facts: Roger Shaw and Richard Winn had been teaching at Frederick Community College since 1968 and 1969, respectively. Professor Shaw was tenured and Professor Winn was under a continuing appointment. Both were designated Division Chairmen, positions that entailed considerable administrative responsibilities in addition to teaching duties. The Policy Manual which sets forth regulations adopted by the Board of Trustees for the governance of the college, and which all teachers were expected to be familiar with, specifically imposed upon Shaw and Winn the obligation to attend and participate in, among other things, commencement and scheduled workshops.
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> On about May 22, 1973, Professors Shaw and Winn received letters from Dr. Stephens, the college president, stating that termination of their employment as of June 30, 1973 was being considered. The assigned reasons were that they willfully and in concert with others refused to attend the workshop on May 17, 1973, and refused to participate in commencement exercises on May 20th. These letters, which were received in slightly different form by the other protesting faculty members who were not Division Chairmen, far from represented an irrevocable decision of dismissal. Indeed, Dr. Stephens made known his desire to meet with each protestor, and solicited letters from each explaining his actions. Everyone understood the deadline for action by Shaw and Winn was June 30th. Following discussions in mid-June with an attorney representing all (including Shaw and Winn) but one of those who received termination letters, Dr. Stephens indicated that termination proceedings would be dismissed against all those who met the following conditions: Acknowledged that

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[116] Shaw v. Board of Trustees of Frederick Community College, 549 F. 2d 929 (1976).

the activities engaged in were a neglect of professional duties; promised not to participate in such activities in the future; and agreed that the Policy Manual was the basis upon which the college would be run. Dr. Stephens even agreed to accept a prepared form letter incorporating these conditions, subject to the requirement that each faculty member desiring to avail himself of this procedure also have a personal conference with him. Professors Shaw and Winn, despite the availability of this form letter procedure, failed to take action to head off dismissal proceedings prior to their deadline of June 30th. The record reflects Dr. Stephens' continuous desire prior to that date to sit down and discuss the matter with them, and his encouragement that they accept the conditions that had been set forth. They declined to do so, however, until July 2, 1973, Professor Winn having previously indicated his unwillingness to admit that he had neglected his professional duties. When letters similar to those that had previously been found acceptable were finally received from Shaw and Winn on July 2nd, Dr. Stephens advised the two that their action had come too late and that the matter had been referred to the Board of Trustees. Following hearings by the Board in July and August, at which Shaw and Winn were represented by their attorney, an alternative dismisal was offered to the four remaining faculty members, including Shaw and Winn, who had failed to meet the June 30th deadlines. They were offered one year employment contracts, provided they perform work off campus. Shaw and Winn declined this offer and were subsequently discharged.

Issue: Whether the dismissals were for violations of legitimate conditions of employment, or as plaintiff claims, for engaging in constitutionally protected activity?

Decision: Dismissal was for violation of legitimate conditions of employment.

Reasoning: The court in this case quoted Wood and Bishop saying: "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in

> wisdom or compassion," Wood, 420 U.S. at 326, 95 S.Ct. at 1003, or because of mistake, Bishop, 96 S.Ct. at 2080. The question is whether the dismissals constituted a denial of plaintiff's rights of association and expression guaranteed by the First Amendment, as they claim. They, of course, did not surrender those rights by virtue of accepting employment in a public educational institution. They had every right to disagree with the changing of the tenure system and the trustees' failure to grant formal bargaining rights with the college administration, and to say so. But because their position is that they could not, consistently with the First Amendment, be discharged for violating the terms of their employment simply because those violations were a part of such a protest, must be rejected. The conduct of Shaw and Winn went beyond pure speech into the realm of breach of the express obligations of their employment. They admit that they willfully absented themselves from the scheduled workshop and failed to participate in commencement in the manner expected of them. It was within the discretion of the Board of Trustees to discharge them for those reasons. After the deadline of June 30th had expired without Shaw or Winn having met Dr. Stephens' conditions, the Board of Trustees offered them one year contracts as an alternative to dismissal. They declined to avail themselves of this second opportunity to avoid discharge, and now ask the court to provide a third opportunity. This we cannot do.

Butzner, Circuit Judge (dissenting):

> Except for the judge's assessment of the competency of the legal advice Dr. Shaw and Dr. Winn received, I agree with his comment on the evidence. I do not agree with his conclusion that the facts 'provided legal justifications' for the college to discharge these professors. Therefore, I would reverse the judgment of the district court, and direct their reinstatement.

The rule of law that the By-Laws of the governing body with respect to termination and conditions of employment become part of the employment contract between

the college and the Associate Professor, who at the time of the offer and acceptance of his initial appointment was advised in writing that the offer and acceptance of the appointment constituted a contract honoring policies and practices set forth in the faculty handbook which was furnished to him at that time, was set forth in Brady v. Board of Trustees of Nebraska State College.[117]

> Facts: The plaintiff was a tenured Associate Professor at Wayne State University. He was dismissed without a hearing in June 1973. This was after the college budget for 1973-74 school year had been reduced by the Legislature. This action is for damages and for declaratory relief as a result of the termination of his employment.
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> The District Court found that the plaintiff was entitled to procedural due process before the termination of his tenured employment. The trial court dismissed the plaintiff's petition upon the ground that procedural due process had been available to the plaintiff under a grievance procedure in a collective bargaining agreement, but the plaintiff had missed a time limit in that procedure and was therefore bound by the resulting dismissal on procedural grounds. From the fall of 1968 through the summer of 1970, the plaintiff was employed as an Assistant Professor at Wayne State University. During the 1970-71 school year, the plaintiff took a leave of absence for additional work on his Ph.D. He was offered and accepted reappointment for the 1971-72 school year, and was promoted to Associate Professor. Due to funding problems, he was not offered appointment for the summer of 1972. He was again reappointed for the 1972-73 school year with tenure at a salary of $10,400. Plaintiff's contract of employment specifically included the college bylaws, policies and practices relating to academic tenure and

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[117] Brady v. Board of Trustees of Nebraska State College, 242 N.W. 2d 616 (1976).

faculty dismissal procedures. The tenure provisions of the bylaws provided that dismissal of a faculty member with tenure must be initiated by the President or other administrative officer, who must hold a personal conference with the faculty member to discuss the anticipated action. If the problem is not resolved in the first step, the President is to present a formal statement of reasons for termination and provide the faculty member with a date for a hearing by a faculty committee. The full formal faculty committee hearing includes the right to counsel, presentation of evidence, witnesses and affidavits and requires recording and a transcript of the hearing. The faculty committee makes its recommendation to the President but regardless of that recommendation, a hearing may be requested before the governing body of the college by either the President of the faculty member facing termination. This hearing is also a formal hearing and the decision of the governing board is final. At no time did Brady ever have a hearing nor was he ever notified of his termination or prospective termination until after the college board took official action to terminate his employment on June 16, 1973.

On February 21, 1973, the President of the college wrote Brady: "You are hereby offered reappointment in your present assignment for 1973-1974. Salary statements may be made only after the legislature has acted on our budget request." On March 10, 1973, the interim President of the college wrote Brady: "Due to the condition of funds, it is not possible to offer extension of appointment for the third term of summer session of 1973." By letter dated June 18, 1973, the interim President informed Brady that because of the level of legislative appropriations he would not be offered reappointment for the 1973-1974 academic year. The letter advised him that this termination was based on "financial exigency." In that letter, the interim President advised Brady that, by appointment, he would discuss the conditions under which Brady's termination was made and under which Brady was selected as one of the people to be terminated; and that he would be pleased to give Brady any assistance possible in helping him find employment. Brady was in Oregon when he received the notice of termination. On June 30, 1973, the plaintiff Brady wrote to the Chairman of the Department of Social

Sciences attempting to initiate a grievance procedure provided for in a collective bargaining agreement between the board and the Higher Education Association of Nebraska. He was not a member of the Association but was entitled to the benefit of the bargaining agreement. He set out as the basis for his grievance that his tenure status had been violated and that the college had not dismissed him in accordance with the provisions of the bylaws, which were a part of his contract. On July 6, 1973, the Chairman of the Department of Social Services denied Brady's grievance. On July 10, 1973, Brady wrote to the Dean of Arts and Sciences for the college. He again indicated the two grounds for his complaint. On July 16, 1973, the Dean wrote a letter to Brady in Oregon advising him that his termination was based on financial exigency and denied his grievance. On August 3, 1973, Brady wrote to Dr. Wills, the earlier denials of grievance had relied upon "financial exigency" but had ignored his specific requests. On August 13, 1973, Dr. Wills advised Brady that his August 3rd appeal had been carefully reviewed and that Dr. Wills had determined that the grievance was denied "for a number of reasons." Dr. Wills first asserted that Brady's appeal was out of time because it was after July 26, 1973. Second, that Brady had not enumerated any specific provisions of the bylaws or the collective bargaining agreement which had been violated. Third, that under the bylaws, tenure ceases when the position in question no longer exists, and because the plaintiff's position was eliminated due to lack of funds, his tenure status ceased at the time his position was eliminated. Fourth, Dr. Wills asserted that the notice provisions of the bylaws applied only to probationary employees and they were not applicable to the plaintiff. On August 20, 1973, Brady appealed to the Chaiman of the Faculty Senate, and on August 24, 1973 the appeal was rejected on "procedural grounds" that he had not appealed the grievance to Dr. Wills within 10 days after the July 16th letter denying his grievance. The legislative appropriations for the college in the spring of 1973 provided for approximately 80 full-time equivalent faculty members where there had been 99 in the 1972-1973 school year. Because of authorized terminations for other reasons, only seven faculty members were

recommended for involuntary termination. Three of those were in the history department. When Brady was terminated, one untenured member was retained in the history deparment and another untenured person, the former President of the college was added to the faculty at a salary higher than other members of the history department. The plaintiff's position was not eliminated but he was. Others including an untenured person taught his former courses in the 1973-1974 school year. It is uncontested that Brady was a good teacher and that no termination for cause could be justified.

Issues: 1. Were the bylaws of the governing body with respect to termination and conditions of employment a part of the employment contract between the college and Brady?
2. Did the action of the legislature in reducing appropriations make it impossible for the university to perform its contractual commitments to Brady?
3. Because Brady began a grievance procedure under the HEAN collective bargaining agreement, did he waive his constitutional right to due process and also his contractual rights?

Decisions: 1. Yes.
2. No.
3. No.

Reasoning: (1) The court said that there can be no serious question but that the bylaws of the governing body with respect to termination and the conditions of employment became a part of the employment contract between the college and Brady. At the time of the offer and acceptance of the initial appointment in 1967, Brady was advised in writing that the offer and acceptance of appointment at Wayne constituted a contract honoring the policies and practices set forth in the faculty handbook which was furnished to him at that time. The court pointed out that courts have generally held that where a college faculty member is employed using annual reappointment forms which do not set forth in full the terms and conditions of employment, the employment policies,

rules and regulations of the college become a part of the employment contract between the college and the faculty member. (2) The reduction in funds simply made it financially impossible to pay the salaries under seven faculty contracts. It did not make it impossible to pay Brady any more than it made it impossible to pay any one of the more than 100 other faculty contracts. In any event, the reduction in the funds could not and did not in any way make it impossible for the defendant to perform its contractual obligations to give Brady notice and hearing prior to termination. A tenured professor has a sufficient property interest in continued employment to entitle him to the protection of procedural due process. (3) The HEAN grievance procedure required a hearing at each step of the appeal. It also required that any grievance initiated by a tenured faculty member which involved a dismissal or non-reappointment required a hearing procedure in step 4. The defendant simply ignored these provisions. There is no evidence in the record to support the dismissal of the appeal as out of time except an assumption as to the time of receipt of a letter, and then the computation of time is based on an erroneous interpretation of the bargaining agreement by reference to other provisions which are inapplicable.

The plaintiff was deprived of his right to notice and hearing required to be granted to him before he could be deprived of rights. The termination was ineffective to terminate his teaching contract. That contract, therefore, continued on the same terms for the 1973-74 contract year. There is no practical justification for an indefinite extension. His salary for the previous year was $10,400. There had been no agreement as to salary for the following year. Under such circumstances, the measure of damages is the amount of his salary for the last effective year of his contract, $10,400 less the amount which he earned, or with reasonable diligence could have earned from other employment during the 1973-74 contract renewal period.

Failure to negotiate a contract was the basis for the civil rights action in Franklin v. Atkins.[118] Im-

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[118]Franklin v. Adkins, 409 F. Supp. 439 (1976).

portant rules of law for colleges and universities derived from this case are: (1) There is no requirement in the Constitution that a college teacher's classroom conduct be the sole basis for determining his fitness for teaching, in that fitness for teaching depends on a broad range of factors. This is particularly true in a case of potential applicant rather than a case of present employee seeking to continue in his position,[119] and (2) University Regents may decline to hire a professor for good reason or perhaps, for no reason, but they may not do so for bad reason if that reason is one's lawful exercise of a constitutionally protected right.[120]

> Facts: On December 3, 1973, the plaintiff applied for one of two available faculty positions in the English Department at the University of Colorado. Although his application was one of several hundred submitted, the English faculty approved his application in January, 1974 by the "overwhelming" vote of 26 to 5 with one abstaining. Prior to subsequent independent investigations and interviews, the plaintiff's appointment also received the approval of the Dean of the College of Arts and Sciences. The Vice President and the President at that time also approved his appointment. At the regular meeting of the Board of Regents of the University of Colorado on April 25, 1974, Dr. Thieme presented the plaintiff's application for consideration with his recommendations. However, the Regents voted 8 to 1 against approval. On June 25, 1974, at another regularly scheduled meeting of the Board, the same Regents voted to refuse to reconsider the earlier vote. The eight in-

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[119] Franklin v. Adkins.

[120] Franklin v. Adkins.

dividual Regents voting against the plaintiff on each occasion are the named defendants. Plaintiff brings this action under 42 U.S.C. section 1983, seeking injunctive relief and damage against each defendant, and, pursuant to Rule 57, Fed. R. Civ. P., a declaratory judgment. Injunctive and declaratory relief are also sought for the alleged violation of the university's own regulations by the defendants. Plaintiff's claim that each defendant's decision was based primarily if not solely on Professor Franklin's belief in Marxism, his advocacy of that political belief and philosophy in his speeches and writings and his participation in various political movements, groups, and demonstrations, thus abridging his First Amendment right to free speech and association as well as violating university regulations. Defendants respond that the decision not to hire Mr. Franklin was a valid exercise of the discretion vested in them, and involved a determination that the hiring of the plaintiff was not in the best interests of the University of Colorado.

Issues: 1. May the Board of Regents consider factors other than a teacher's classroom conduct when reviewing his application for employment?
2. Did the defendants base their decision on grounds which impermissibly abridge the plaintiff's constitutional rights on a consideration prohibited by their own regulations?

Decisions: 1. Yes.
2. No.

Reasoning: (1) The Board of Regents were not limited to their consideration of the plaintiff's application to his academic qualifications and teaching abilities alone. There is no requirement in the Federal Constitution that a teacher's classroom conduct be the sole basis for determining his fitness for hiring. Fitness for teaching depends upon a broad range of factors. This is particularly true in the case of a potential applicant, rather than that of a present employee seeking to continue in his position. The state's interest in obtaining even marginly relevant in-

> formation about an applicant is greater because of the lack of other more direct information from his conduct as an employee. This is not to say that the determination may be placed on any basis. The Regents may decline to hire a professor for a good reason or, perhaps for no reason. But it may not do so for a bad reason if that reason is one's lawful exercise of a constitutionally protected right(s). (2) The speeches and activities of the plaintiff at Stanford were the paramount reasons which led to the votes to disapprove his appointment, both because the defendants perceived that conduct as falling outside the realm of protected free speech, and because the pattern of conduct indicated to them a substantial risk of similar occurrences on the University of Colorado campus should the plaintiff receive a faculty appointment. As the plaintiff concedes, a separate but related basis for the refusal to hire which could have been and was relied upon was the fear of disruptions on the University of Colorado campus. Certainly, in a situation of potential disruption, there is no requirement in the law that the proper authorities must wait for the blow to fall before taking remedial measures.

In Smith v. Greene, the court for Colleges and Universities held: (1) A college faculty member may have a "property interest" protected by the due process clause if there are policies and practices promulated and fostered by the college officials that constitute legitimate claim of entitlement to the continued employment," [121] and (2) where the probationary period for the community college teachers was limited by statute to three consecutive regular college years, notice that the teacher's contract would not be renewed for the fourth year was equivalent to notice both that the tenure was not awarded and that the teacher's

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[121] Smith v. Greene, 545 P. 2d 550 (1976).

probationary faculty appointment would not be renewed.[122]

Facts: The appellant held a "probationary faculty appointment" with Washington State Community College District No. 17. He brought this suit against the officers and trustees of the district. The respondents allege error in their denial of tenure to him. Respondent's motion for summary judgment was granted by the superior court. Beginning in September 1971, the appellant was employed by the Community College District No. 17 under the terms of three one-year contracts which designated appellant's status as a "probationary faculty appointment," under the Community College Act of 1967. A review committee established pursuant to the act periodically observed and evaluated the appellant's teaching during each of these years. The evaluations covered appellant's performance in a number of areas. Some of the reports, in a number of areas, indicated that the appellant needed improvement, although the committee twice recommended the appellant be granted tenure. Affidavits filed in the case indicated that the district's board of trustees had uniformly decided not to consider tenure until the third probationary year. On Febrary 5, 1974, copies of the review committee's reports and recommendations, along with letters of District President Johnson and Spokane Falls Community College President Snyder recommending denial of tenure, were mailed to the appellant and each trustee. The letters of Johnson and Snyder did not state the reasons for their recommendation that tenure be denied. On February 21, 1974, the trustees considered all of the recommendations submitted and allowed the appellant and his supporters to speak in his behalf. The trustees then unanimously voted not to grant the appellant tenure without stating any reason for this decision. The following day, President Johnson, as Secretary of the board of trustees, notified the appellant by letter that his employment contract would not be renewed for the 1974-75 school year or for any other year.

Issues: 1. Did the appellant have a legitimate claim of entitlement to continued employment sufficient to invoke due process protections?

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[122] Smith v. Greene.

2. Did a statutory requirement of "reasonable consideration" by the board of trustees create a protectable property interest or require that reasons be given for their decision?
3. Did the members of the board of trustees act beyond their authority in considering the recommendations of the presidents of the college and district?
4. Is the trustees' practice of requiring three years of probationary teaching before consideration of an award of tenure invalid?
5. Did the letter from the Secretary of the board of trustees constitute the required notice of non-award of tenure?

Decisions: 1. No.
2. No.
3. No.
4. No.
5. No.

Reasoning: (1) A faculty member may not have a "property interest" protected by the due process clause if there are policies and practices promulgated and fostered by the college officials that constitute a legitimate claim of entitlement to continued employment. The Supreme Court has stated that to have a property interest in a benefit, a person must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must have a legitimate claim of entitlement to it. Property interests are not created by the Constitution itself. They are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules of understandings that secure certain benefits and that support claims of entitlement to those benefits. (2) Appellant's faculty appointment for a designated period of time was subject to termination "without cause upon the expiration of the probationer's term of employment." Under the terms of his third one year contract with Community College District No. 17, appellant's appointment ended in June 1974. The fact that the review committee's recommendations are usually followed is not the kind of conduct which should confer a legitimate expectancy of tenure. (3) The action of the board

> of trustees in considering the recommendations of the district and college presidents was not beyond its authority. As a matter of practical administrative procedure it is reasonable for a board of school directors to seek the assistance of its subordinates in gathering facts and making recommendations for their consideration. (4) RCW 28B.852 does not create a statutory right to tenure consideration, "at any time" during the probationary period. This section is clear and unambiguous. (5) WAC 1321-88-080(2) requires that written notice of the award or nonaward of tenure be transmitted to the probationer. The letter of February 22 did not use the word "tenure" but stated that the appellant's employment contract with District No. 17 would "not be renewed for the 1974-1975 or any other ensuing year." However, since the probationary period is limited to three consecutive regular college years under the statute, notice that the appellant's contract would not be renewed for a fourth year is equivalent to a notice both that tenure was not awarded and that his probationary faculty appointment would not be renewed. The pertinent statutory provision requires notice of a decision "not to renew a probationary faculty appointment and does not refer to tenure."

Grimm v. Cates brought forth two rules of law specifically for Colleges and Universities. They are: (1) Exercise of First Amendment rights are not the basis for discharging non-tenured teacher unless the exercise of such a right clearly overbalances the teacher's usefulness as an instructor and (2) In view of the witnesses' testimony that the terminated university professor's activities for the teachers' organization had not been considered in their recommendation to terminate the professor's employment at the university, the trial court in civil rights action brought by the professor was correct in its determination that testimony offered at trial did not prove by a

preponderance of the evidence that the professor was dismissed for reasons relating to the exercise of First Amendment rights.[123]

Facts: University professor brings a civil rights action, claiming that his constitutional rights under the First and Fourteenth Amendments were abridged when he was issued a terminal contract. The U.S. Court for the Western District of Texas held that the professor was not entitled to a hearing, or a statement of reasons for his dismissal. The professor appealed. The Court of Appeals held that the evidence supported the trial court's finding that the professor did not have a de facto tenure under the practice and policy prevailing at the university and that he was not entitled to a hearing to determine whether the issuance of a terminal contract constituted a violation of his academic freedom.

After receiving his Ph.D. from the University of Illinois in 1963, the appellant taught for one year at the University of Illinois, three years at Texas Tech. University and one year at Sam Houston State University. Dr. Grimm was hired as an Associate Professor by Southwest Texas State University for the academic year of 1968-1969. He completed three nine-month teaching contracts at SWTSU for the academic years 1968-1969 prior to receiving terminal notice in May of 1971 and being issued a terminal contract in June 1971.

Issues:
1. Did the district court incorrectly hold that the plaintiff did not have tenure?
2. Was the plaintiff denied due process of law?
3. Was the plaintiff entitled to a hearing before a faculty committee to determine whether the issuance of a terminal contract violated his academic freedom?

Decisions:
1. No.
2. No.
3. No.

Reasoning: (1) Under the policy and practice at SWTSU from the fall of 1968 to the spring of 1972, Dr. Grimm had no legitimate claim of entitlement of tenure. Dr.

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[123]Grimm v. Cates, 532 F. 2d 1034 (1976).

> Grimm possessed no property right by which he was entitled to the procedural protection of the Fourteenth Amendment. (2) and (3) Dr. Grimm was not terminated for reasons related to the exercise of the First Amendment rights and he was not stigmatized by his termination. Therefore, it is unnecessary to examine the adequacy of the hearings granted to him by the administration at SWTSU.

In Bishop v. Wood, the courts declared that the federal court system was not a forum for review of all "liberty" rights protected by the Fourteenth Amendment. It held that the United States Constitution cannot feasibly be construed to require federal judicial review for every error in connection with discharge of a public employee. "In the absence of any claim that the public employer was motivated by a device to curtail or penalize the exercise of employee's constitutionally protected rights, federal courts must presume that official action was regular and, if erroneous, can be corrected in other ways than by review of personnel decisions in the federal court."[124] However, the dissenting opinion agrees yet disagrees by elaborating on the need not to review all but to ensure this constitutional mandate of due process are followed.[125]

> Bishop v. Wood Dissenting Opinion (Justices Brennan and Marshall):
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> These observations do not, of course, suggest

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[124]Bishop v. Wood, 96 S.Ct. 2074 (1976).

[125]Bishop v. Wood.

> that a 'Federal court is--the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.' However, the federal courts are the appropriate forum for ensuring that the Constitutional mandates of due process are followed by those agencies of government making personnel decisions that pervasively influence the lives of those affected thereby; the fundamental premise of the Due Process Clause is that those procedural safeguards will help the government avoid the 'harsh fact' of 'incorrect or ill advised personnel decisions.'[126]

Facts: On respondent Chief of Police's recommendation, respondent City Manager terminated petitioner's employment as a policeman without a hearing, telling him privately that the dismissal was based on a failure to follow orders, poor attendance at police training classes, causing low morale, and conduct unsuited to an officer. A city ordinance provides that a permanent city employee (as petitioner was classified) may be discharged if he fails to perform work up the standard of his classification, or if he is negligent, inefficient, or unfit to perform his duties. Petitioner brought suit against Respondents, claiming that as a "permanent employee" he had a constitutional right to a pre-termination hearing; that the ordinance, even though not expressly so providing, should be read to prohibit discharge for any reason other than those specified and therefore to confer tenure on all permanent employees that his period of service, together with his "permanent" classification, gave him a sufficient expectation of continued employment to constitute a protected property interest under the Due Process Clause of the Fourteenth Amendment; and that the false explanation for his discharge deprived him of interest in liberty protected by that clause. During pretrial discovery petitioner was again advised of the reasons for his dismissal. The District Court granted respondents' motion for a summary judgment, holding, on the basis of its understanding of state law, that petitioner "held his position at the will and pleasure of the city." The Court of Appeals affirmed the decision of the trial courts.

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[126] Bishop v. Wood.

Issue: Was the petitioner denied his due process?

Decsision: No.

Reasoning: A property interest in employment can, of course, be created by ordinance, or by an implied contract. In either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law. The North Carolina Supreme Court has held that an enforceable expectation of continued public employment in that State can exist only if the employer, by statute or contract, has actually granted some form of guarantee (Still v. Lance, 182 S.E. 2d 403 (1971). Whether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question. In Board of Regents v. Roth (92 S.Ct. 2701), we recognized that the nonretention of an untenured college teacher might make him somewhat less attractive to other employers, but nevertheless concluded that it would stretch the concept too far "to suggest that a person is deprived of 'liberty' when he simply is not retained in one position but remains as free as before to seek another." This same conclusion applies to the discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge.

In LaTemple v. Wamsley, through an action to recover damages for an alleged breach of a written contract, the court decided that under employment contract between teacher and community junior college which provided that contract of employment would be deemed to continue for next succeeding school year unless written notice of intention to terminate contract was properly served by Board of Trustees before certain date or teacher gave written notice to president on or before certain date that he did not desire continuation of contract, where prescribed

notice of termination was not given or notice was improperly given and teacher was discharged, teacher was entitled to damages in the amount of the salary teacher would have received for the next school year had his employment not been terminated.[127]

Facts: Action for breach of written contract in which the defendants as Trustees of the Garden City Community Junior College employed the plaintiff to teach speech and theater courses and direct dramatic activities for a term of nine months commencing on August 24, 1970, for a consideration of $9,568, payable in twelve equal installments. Previously, the college had adopted a policy manual, Section 17, which states:

> Section 17. The Continuing Contract
>
> The contract of employment of an instructor shall continue in full force and effect during the good behavior and efficient and competent service rendered by the instructor. The contract of employment shall be deemed to continue for the next succeeding school year unless written notice of intention to terminate the contract is served by the Board of Trustees on or before the fifteenth day of March, or the instructor has given written notice to the President on or before the fifteenth day of April that he does not desire continuation of said contract. The Board of Trustees, upon the recommendation of the President, may consider an instructor for discharge or termination of contract for any of the following causes:
>
> Immoral character, conduct unbecoming an instructor, insubordination, inefficiency, incompetency, physical unfitness, or failure to comply with reasonable requirements of the Board of Trustees as may be prescribed to show normal improvement and evidence of professional training.

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[127] LaTemple v. Wamsley, 549 F. 2d 185 (1977).

> In the event that an instructor is being considered for discharge or termination of his employment contract, he shall be given a warning and a specific statement in writing of defects or reasons for the proposed discharge or termination of contract. Thus, he will have an opportunity to show improvement.
>
> Following this procedure, if it becomes apparent that an instructor's contract will be terminated he shall be served a written notice by the Board of Trustees on or before the fifteenth day of March that his contract will terminate at the close of the academic year and will not be in effect for the succeeding school year.
>
> Instructors desiring a hearing before the Board of Turstees must file a request for same with the President within a fifteen day period after receipt of notice.

The trial court held as a matter of law that the plaintiff's contractual rights included the rights provided by Section 17 as well as those rights set forth in the written contract of employment. The evidence discloses dissatisfaction on the part of the college admininistration with plaintiff's conduct by letter dated January 29, 1971.

On March 10, 1971, defendants notified plaintiff as follows:

> Dear Mr. LaTemple:
>
> This letter shall serve as written notice that your contract of employment with the Board of Trustees of the Garden City Community Junior College will terminate at the close of this academic year. You will not be offered a contract for the succeeding school year 1971-1972. Should you desire a hearing before the Board of Trustees, please advise and file a written request with President Raymond Wamsley within fifteen days after receipt of this notice.
>
> Sincerely yours,
> /s/ John G. Collins
> Vice Chairman
> Board of Trustees
> (Exhibit 6)

Plaintiff requested a hearing before the Board. The request was granted and the hearing was held on April 28, 1971, with no changes in the Board's action to terminate plaintiff's employment contract.

Issues: 1. Was plaintiff's employment contract terminated for one or more of the causes in Paragraph 2 of Section 17?
2. Was plaintiff given the warning described in Paragraph 3 of Section 17?

Decisions: 1. No.
2. No.

Reasoning: Section 17 clearly contemplates a contract of employment continuing from year to year but terminable by either party upon notice. If the prescribed notice is not given, or the notice is improperly given, the employee is entitled to a contract for the succeeding year and his discharge prior thereto is a breach of the contract. The measure of damages is the salary the plaintiff would have received the next school year had his employment not been terminated.

Two rules of Constitutional Law emanated from Tyler v. College of William and Mary. They were: (1) A property interest in employment, for purposes of due process, is indicated by a legitimate claim of entitlement to continued employment; and (2) One has the right to due process for loss of employment if he can prove he has a property interest in the job, and a property interest is indicated by actual or implied guarantees of continued employment.[128]

Facts: Plaintiff was hired by the College of William and Mary as Assistant Professor of Modern Languages and Literature for the academic year of 1969-70. That contract was renewed each year for six years and the final contract signed for plaintiff's seventh year of teaching was designated as a

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[128] Tyler v. College of William and Mary, 429 F. Supp. 29 (1977).

termination contract after which plaintiff would not be rehired. The court finds as a fact that this procedure was followed in accordance with the well-established general college policy of employing a teacher for six years to determine his or her qualifications for tenure and then, if tenure was not granted, terminating employment at the end of the seventh year. The criteria set out in the Faculty Handbook and generally recognized by the College as requisites to tenure include:

> (1) Possession of education, experience and degrees necessary to perform the individual's duties; (2) Ability to effectively teach, based on command of material and good student rapport; (3) Evidence of research, publications and other contributions to his field of study; and (4) Participation in department, faculty and college governance.

Additional requisites which appeared in the testimony of Dr. George R. Healy, Vice President for Academic Affairs, include:

> (1) Tenure requirements set up by the individual departments; (2) Needs of the College as a whole, i.e., available funds; and (3) Needs of the department, i.e., future directions and goals, over-tenured faculty.

The Department of Modern Languages, the department in which plaintiff was employed, incorporated the four criteria set out in the Faculty Handbook in its requisites for tenure and included an additional emphasis on teaching effectiveness, scholarly activities not limited to publications, and participation in special services to students. During his seven years within the Department of Modern Languages, plaintiff was appointed to the Board of Student Affairs, the Computer Center, and as coordinator of the French and Italian section for three years. He was awarded his Ph.D. in French Literature from the University of Virginia in 1971 and in 1974 published A Concordance to the Fables and Tales of Jean de la Fontaine, a work running over a thousand pages and reviewed as one of the three most important basic reference works to appear on that author. Plaintiff generally served as French instructor for the lower

level classes (defined as freshman and sophomore classes) and contributed to the language laboratory by utilizing his electronic skills to install new equipment and to modify existing facilities. For these contributions, plaintiff was highly praised by the former head of the deparment, Mr. J. Worth Banner, and the current department head, Ms. Elsa S. Diduk. He was also recommended by these department heads and his department for promotion to Associate Professor on three occasions and for tenure twice. He was denied the promotions and tenure on all occasions for the stated reasons that plaintiff is an average but not excellent academician and that his inclusion within the Department of Modern Languages would not greatly strengthen it.

Issue: Did the plaintiff develop some property interest in his job as would entitle him to special consideration outside the well-established policy on tenure?

Decision: No.

Reasoning: The College of William and Mary had a formal tenure system. The system operated on a clearly enunciated policy that a teacher could remain within the system beyond a probationary period of seven years only if granted tenure which required the approval of his department and department head, the Advisory Committee on Retention, Promotion and Tenure, the Dean of Arts and Sciences, the Vice President for Academic Affairs, the President of the college, and the Board of Visitors. Plaintiff did not receive the required approval and therefore did not receive tenure. The court did not find from the evidence that plaintiff enjoyed actual or implied guarantees of continued employment, or a legitimate claim of entitlement to continued employment in a formal tenure system or a claim of entitlement supported by rules or mutually explicit understanding in a de facto tenure system so as to give rise to a property interest protected by due process.

For college and university precedent, the court in Gupta v. Boyer ruled that the trial court in Article 78

proceeding brought by a professor who claimed that non-renewal of his term of employment was subterfuge by the college to avoid according him substantive and procedural due process required on discharge for professional misconduct, erred in ordering that, if professor's allegations were found to be true, trial court should be held to adjudicate professional misconduct charges; if professor should have been charged with such conduct, trial court was required to remit matter to college for proceedings consistent with governing labor agreement.[129]

> Facts: Petitioner in this article 78 proceeding alleges that he is a professor of history at State University College at Brockport, having initially received a three year term appointment in 1970 which was renewed for a two year term in July of 1973. Petitioner further asserts that subsequently, by a letter from respondent-appellant College President Brown dated August 26, 1975, he was notified that his term appointment would not be renewed and that as of August 31, 1976, his status as a faculty member at the college would automatically cease. This non-renewal of his term appointment, petitioner contends, 'was a mere subterfuge and ploy' created . . . to secure (his) dismissal without having to . . . accord him with substantive and procedural due process of law, as provided for under the policies of the Board of Trustees of the State University of New York . . . and the Agreement between the State of New York and United University Professors, Inc. . . . in cases where an employee is charged with professional misconduct.
>
> Respondents-appellants appeal only from that part of Special Term's order which sets forth the so-called 'third step' of the trial. The argue that 'because the controlling labor relations agreement establishes exclusive jurisdiction and procedures for the conduct

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[129]Gupta v. Boyer, 391 N.Y.S. 2d 255 (1977).

of disciplinary hearings, it was an error for the court below to have ordered that such hearing is to be conducted, if at all, by the court.'

Issue: Should the charges of misconduct be remitted to resolution by the college in proceedings consistent with the governing labor agreement?

Decision: Yes.

Reasoning: As a result of the exclusive nature of the disciplinary procedures set forth in the "Agreement" which supplants otherwise extant rights and remedies of petitioner, the court may properly police the fair administration of said Agreement to prevent one side, or the other, from circumventing, by any pretext, its controlling provisions and/or procedures. The trial court should proceed with the first step of its proposed trial in order to 'preliminary determine' whether, on the facts adduced, respondents were required to present charges of professional misconduct against petitioner so that he may be afforded a hearing on such charges as provided in the Agreement. As respondents-appellants state in their brief, it it is found that petitioner should have been presented with charges of professional misconduct, and that he should have been afforded a hearing as a condition precedent to the non-renewal of his term appointment, the trial court should, at that point, remit the matter for resolution to respondent appellant college for proceedings consistent with the governing labor Agreement.

In Gorman v. University of Miami, the court reasoned that where faculty member's right to tenure and, therefore, continued employment, was fixed by terms of his employment, alleged oral promise of university president to take specified action upon faculty member's appeal to him did not constitute an individual contract.[130]

Rehearing Denied: January 12, 1977

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[130]Gorman v. University of Miami, 340 So. 2d 1180 (1977).

Facts: Appellant seeks damages for wrongful termination of his employment. Dr. Gorman contends that he had earned tenure under his contract of employment which included provisions of the faculty manual of the university. On the other hand, the defendants contend that the terms of the plaintiff's employment are to be determined from the annual Faculty Appointments, which gave a later date for the plaintiff's obtaining tenure than that which would be computed from the faculty manual. It is undisputed that the later date was an error occasioned by the action of the university. There is conflicting evidence concerning plaintiff's actions upon learning that he had been mistakenly assigned a later date for the attainment of tenure.

Issue: Does the oral promise of the president of the university to take specific actions on the plaintiff's appeal to him constitute an individual contract?

Decision: No.

Reasoning: The court correctly entered summary final judgment on count two of the complaint, which claims the breach of an oral contract by Henry King Stanford, President of the University of Miami. There is uncontroverted proof that plaintiff's right to tenure and, therefore, continued employment were fixed by the terms of his employment and the alleged oral promise of the president of the university to take specified actions upon plaintiff's appeal to him does not constitute an individual contract. In addition, it appears that at all times defendant Stanford was acting as an officer of the university and not in his individual capacity. The court considered plaintiff's point directed to the granting of defendant's objection to certain interrogatories and find that no error has been demonstrated on this point, especially in light of the holding upon count two of the complaints. Finally, because of the views expressed herein, the trial judge's order striking the plaintiff's prayer for the remedy of reinstatement should be reversed. Affirmed in part, reversed in part and remanded.

Where tenured teacher submitted written resignation at the end of the next academic year and it was accepted,

the college had right to refuse to honor teacher's attempted withdrawal of resignation especially since college had acted on resignation in planning reduction in faculty, was the holding for colleges and universities in Gras v. Clark.[131] The court also held that a tenured professor's letter of intention to resign at end of next academic year was a voluntary relinquishment of her right to claim a continued contractual status as tenured teacher, and could have been withdrawn at any time prior to effective date if it either had not been accepted by employer or not been acted upon by employer in a manner to prevent employee from insisting on revocation.[132]

> Facts: The affidavit of Robert J. Clark, the Dean of Faculty of Elmhurst College, stated that either in the month of July or August of 1972, Donna Gras advised him of her decision to retire as a member of the teaching staff in the fall of 1974; that on or about November 1, 1972, the verbal decision was confirmed in writing by the following letter which plaintiff handed to Clark:
>
> > This is to confirm my decision to retire in the fall of 1974. I had already mentioned it to you and also Dr. Frick this summer. However, I understand that a written confirmation is necessary at this time.
>
> It was further stated that in reliance on the resignation Clark conferred with plaintiff and with another member of the teaching staff, Paulette Hatmaker, and that both of the parties agreed to accept an appointment for the 1973-74 teaching program. This was confirmed and accepted by the following

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[131] Gras v. Clark 361 N.E. 2d 316 (1977).

[132] Gras v. Clark.

letter sent by Dr. Frick to Mrs. Gras dated December 4, 1972:

> For financial reasons, the Executive Committee of the Board of Trustees has authorized that your appointment for 1973-1974 will be half-time. During this year your full fringe benefits program will continue. You are an outstanding teacher and we do appreciate your services to Elmhurst College.

Further pleadings showed that plaintiff had notified the defendants in August of 1973 that she was withdrawing her resignation but that defendants advised her that she would not be allowed to do so. Defendants' motion for summary judgment was granted, based upon the pleadings, affidavits and a transcript of plaintiff's testimony at a hearing on a motion for a preliminary injunction. Judgment was entered in favor of the defendants from which plaintiff appeals. Plaintiff seeks to enjoin the college in violation of the employment contract to recover damages.

Issues: 1. Does the plaintiff have a contract right to continued employment?
2. Is plaintiff estopped from claiming that the college was not permitted to prevent the withdrawal of her resignation?

Decisions: 1. No.
2. Yes.

Reasoning: (1) In effect, the plaintiff's letter of intention to resign on the prospective date fixed by the end of the 1973-1974 academic year was a voluntary relinquishment of her right to claim continuing contractual status as a tenured teacher. The resignation could have been withdrawn at any time prior to the effective date if it had either not been accepted by the employer or not acted upon by the employer in a manner to prevent the employee from insisting on revocation. (2) The doctrine of waiver is based upon the principle that one may dispense with something of value by a voluntary act done with full knowledge of the rights involved and with an intention to relinquish those rights. When consideration for the

> waiver is lacking the resignation may be supported by proof of conduct which gives rise to an estoppel. Mrs. Gras' letter of resignation was a statement of her intention to waive her right to continuing contractual employment as a tenured teacher effective at the close of the 1973-1974 academic year. Mrs. Gras was acting with full knowledge of the rights which she would be giving up. A written resignation tendered to the proper officials and filed by them, is considered accepted. Upon acceptance of a tenured teacher's resignation even though the effective date is prospective the employing authority has the right to refuse to honor a withdrawal of the resignation. The delivery of Mrs. Gras' written resignation to the president of Elmhurst College upon his request after plaintiff's previous oral statements that she intended to resign amounted to an acceptance of the resignation. The college could refuse a subsequent withdrawal. In any event, plaintiff's additional circumstance that the college acted on plaintiff's resignation in planning a reduction in the French Department faculty is sufficient to estop plaintiff from claiming that the college was not thereafter permitted to prevent the withdrawal of her resignation.

Trimier v. Atlanta University, Inc., held that Administrative Assistant to Dean of School of Business Administration at the university was not entitled to recover for breach of contract on alleged ground that notice on June 26 of termination effective July 31 due to general economic conditions came too later after offer in May of renewal of her contract for following year, where both her existing contract and renewal contract clearly provided for termination with 30 days' notice because of budgetary or economic situations on part of university; clause in employment manual, on which Administrative Assistant based her claim, requiring notification of non-reappointment for

following academic year by March 15 of existing academic year had reference to non-reappointment and renewal of contract of employment which did not control termination of service by reason of lack of funds and economic consideration.[133]

> Facts: Ms. Trimier was employed as an Administrative Assistant to the Dean of the School of Business Administration at Atlanta University, Inc. and had served in that position since June 8, 1971. She was employed on a year-to-year basis from the beginning of September of one year to the last of August of the following year. In May 1975, she was offered a new contract for the following year for the period from September 1, 1975 to August 31, 1976, being under contract at that time which did not terminate until August 31, 1975. The contracts under which she was employed provided for effective termination with 30 days' notice and referred to an employment manual which provided for severance pay of one month's pay for each full 12 months' service up to a maximum of three months' salary of an employee with tenure. On June 26, 1975 the university notified Ms. Trimier that her employment was being terminated effective July 31, 1975, due to present general economic conditions, her release to be effective on June 27, 1975, but that she would be paid for July and August (vacation months) and for three months thereafter in severance pay. Whereupon Ms. Trimier brought suit for breach of contract, contending that she had been re-employed for a full 12 months in May of 1975, and that the employment manual providing for conditions of employment clearly states that if an employee is not reappointed the employee must be notified no later than March 15 of any academic year after the first year of service. Defendant answered, admitting generally all averments of the complaint, but denying that the employment terminated other than under the terms of the contract and denied that plaintiff was entitled to any judgment against it. After discovery, which involved admission of facts and genuineness of documents with reference

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[133] Trimier v. Atlanta University, Inc., 234 S.E. 2d 342 (1977).

to the contracts, memorandum terminating employment, and the various excerpts of the employment manual which are pertinent, and based on certain affidavits, all of which show plaintiff's employment was terminated for economic reasons, a motion for summary judgment in favor of defendant was granted. Plaintiff appeals.

Issue: Did defendant breach plaintiff's contract?

Decision: No.

Reasoning: At the time of termination of employment there were two contracts in existence, the first of which ended on August 31, 1975; and a renewal contract commencing the first of September 1975 for one year. There seems to be no dispute as to the facts, even though her employment was terminated.

Where college agreed to pay employees specified commission on tuition received by college from approved enrollments credited to employees, and college, by its voluntary act of ceasing to operate schools, placed performance of its obligation under employment contract beyond its control, employees were entitled to compensation under contract even after employer ceased to operate its schools was a rule of law laid down in Cannon v. Stevens School of Business, Inc.[134] The court also pointed out that a person cannot avoid liability for nonperformance of its obligation under contract by placing such performance beyond his control by his own voluntary act, and no one can avail himself of nonperformance of a condition precedent, who has himself occasioned its nonperformance.[135]

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[134]Cannon v. Stevens School of Business, Inc., 560 P. 2d 1383 (1977).

[135]Cannon v. Stevens School of Business.

Facts: Plaintiff sues in contract for recovery under a contract of employment. Plaintiffs were employed by defendant, to engage "aggressively in student recruitment." Defendant operated two business colleges, one in Salt Lake City, and one in Ogden, Utah. The terms of employment were set forth in a written contract, drawn by defendant. Those provisions relevant to this dispute were contained in sections VII and IX of the agreement.

> VII. To accept as compensation under this employment agreement: 13½ percent for all enrollments taken where the current address is in Weber, Salt Lake or Davis Counties, and 15 percent for all enrollments taken outside these three counties. An additional 5 percent incentive commission will be credited to your commission account at year end in addition to the commissions shown above for all tuition income over $100,000 paid by your students during any calendar year (January 1st to December 31st).
>
> IX. In the event this agreement is terminated by either party and there exists a deficit balance in your commission account, the commission earned from the date of termination forward will be applied toward the deficit balance until that balance has been satisfied. Credit balances on this commission account after termination can be drawn quarterly, the draw to be made during the last month of each quarter, permitting the college to complete the accounting statements and reports for that quarter.

Since plaintiffs were soliciting enrollments over a broad geographical area, they were required frequently to obtain lodging and meals away from home. Defendant would make advancements of $1,000 per month to plaintiffs, to assist in defraying these soliciting expenses. Under its bookkeeping system defendant entered these advances as accounts receivable. Monthly, defendant issued a computer printout to its salesmen. It showed commissions earned, tuition refunds, other adjustments; and the balance in the commission account at

the end of the month. On December 17, 1973, defendant entered into a contract with L.D.S. Business College located in Salt Lake City. In exchange for $200,000, defendant agreed to settle an asserted anti-trust action against the L.D.S. Business College. Defendant also agreed to discontinue the operation of its school in Salt Lake City, and not to compete with (or sell its assets to anyone who would compete with) L.D.S. Business College, for a period of five years. Defendant further covenanted to use its best efforts to influence and encourage its present students to enroll at the L.D.S. Business College; to refer all inquiries concerning present or future educational needs of prospective students to L.D.S.; to grant immediate and exclusive access to all files and records of prospective students, student directories, and mailing lists; and to deliver the permanent records of all of defendant's students of the Salt Lake City school from commencement of its operation to present time. In conformity with this agreement defendant closed its school in Salt Lake City on December 31, 1973. Defendant sold its Ogden school to the Robinsons on December 31, 1973, for a basic purchase price of $267,000. In addition, Robinsons agreed to pay certain accounts receivable, viz., the accounts of plaintiff Cannon for $5,544.06, and plaintiff Van Luyk, for $3,069.07. Defendant conducted no further operations at either school after December 31, 1973; consequently, no further tuitions were collected. Plaintiffs had fully performed the services which they were required to render in order to be entitled to compensation under the employment contract at the time a prospective student was deemed by defendant an "approved enrollment." Plaintiffs contend that they were entitled to compensation for services rendered and that defendant's voluntary actions which prevented its performance in accordance with the terms of the contract constituted a breach entitling plaintiffs to damages. The trial court granted judgment to the plaintiffs and defendant does not challenge the measure of damages. On appeal, defendant contends the trial court erred in its determination that plaintiffs were entitled to compensation under the contract after defendant ceased to operate the schools. Defendant asserts it did not breach the contract, because its duty of performance was excused. This assertion is predicated on the theory the terms of the

contract create an implied condition precedent, viz., defendant must be operating the business if it is to be required to perform. Defendant cites the provision plaintiffs' compensation was based on "tuitions received by the college from all approved enrollments." It urges it had no duty to pay, because it received no tuitions. Its contention is there was no breach of contract, because there was no duty to perform, because its duty to perform was subject to an implied condition precedent, viz., the continued existence of the school, and receipt of tuition.

Issues: 1. Was there a breach of contract?
2. Was there an accord and satisfaction?
3. Was there a set-off?

Decisions: 1. Yes.
2. No.
3. No.

Reasoning: The court reasoned that the defendant would not be entitled to prevail even if its assertion of an implied condition precedent were accepted.

> . . . Where, as here, the compensation agreed to be paid for services rendered is to be paid out of a fund to be collected by the party for whom such services were rendered, there is an implied obligation on the part of the promissor to exercise reasonable diligence to collect the fund from which the promisee may be compensated for such services; and in default of the exercise of such diligence, payment may become due without the performance of the condition. As stated by Professor Williston, it is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance of a condition upon which his own liability depends, he cannot take advantage of that failure.

By its voluntary act, defendant placed performance of its obligation beyond its control, i.e., discontinuing the schools so it could not collect the tuitions, and pay the percentages to which plaintiffs were entitled. (2) An accord and satisfaction is a method of discharging a contract, or settling a claim arising from a contract, by substituting for such contract or claim an agreement for the satisfac-

tion thereof, and the execution of the substituted agreement. To constitute an accord and satisfaction there must be an offer in full satisfaction of the obligation, accompanied by such acts and declarations as amount to a condition that if it is accepted, it is to be in full satisfaction, and the condition must be such that the party, to whom the offer is made, is bound to understand that if he accepts it, he does so subject to the conditions imposed . . . The accord is the agreement and the satisfaction is the execution or performance of such agreement . . . This new substitute agreement must be founded upon a legal consideration and must be consummated by the assent or meeting of the minds of the parties, to the agreement. Where we deal with an unliquidated or disputed demand, consideration may rest on the settlement of the dispute, e.g., the parties agree the debtor will pay and the creditor will accept an amount as a compromise of their differences and in satisfaction of the claim. At the time plaintiffs cashed their checks, the court found, they were unaware of their rights, or that their claims were in dispute. They were unaware of the nature of the contracts defendant had entered into with the third parties, and as a consequence, defendant had breached the employment contracts. Furthermore, neither by the statement on the check or by other communication did defendant express the intention the payment was offered upon the condition it be accepted in full satisfaction, or not at all. (3) In defendant's agreement of sale of the Ogden school to the Robinsons, the Robinsons were required to pay for these specific accounts. The court reasoned this indebtedness to defendant had already been discharged. Mr. Robinson testifies he did not pay plaintiffs (whom he employed) a commission on the old students who continued in the school after he purchased it. He further stated, under his contract with defendant, he was not required to remit to defendant any of the tuition he did not require Cannon and Van Luyk to reimburse him, for paying, to defendant, the accounts receivable. When this law suit was initiated, Robinson refused to assign these accounts to defendant, as requested. The evidence here sustained a finding that the employer was not entitled to a set-off for amounts advanced to employees to assist in deferring soliciting expenses.

The issue of the legal effect of the regulations of the Board of Education implementing the Florida school code was set forth in Phillips v. Santa Fe Community College.[136]

Facts: On complaint by the President of Santa Fe Community College, petitioner Phillips has been dismissed from his teaching position for incompetence and misconduct. The complaint was successively considered by a hearing officer of the Division of Administrative Hearings, who found the facts and recommended suspension for six months, by the Board of Trustees of the college, which accepted the recommended findings and conclusions but imposed the penalty of dismissal and which on Phillips' petition reviewed and sustained the trustees' decision. Phillips now petitions for judicial review of the final agency action discharging him.

Issues: 1. Does the order of the Board of Education satisfy the statutory requisites for agency's final order?
2. Was plaintiff's petition for review untimely?

Decisions: 1. Yes.
2. No.

Reasoning: (1) To require such final agency action by the Board of Education, as sought by petitioner Phillips, would effectively displace the Santa Fe Trustees as the body having authority to discharge instructional personnel at that college. A hearing would be required before the Board of Education itself, or before one of its members, or before a hearing officer whose proposed order would be submitted to the Board. Any prior proceedings before the district trustees would thereby be eclipsed. We decline to so emasculate the specific design of the Florida school code to make it conform to the more general scheme of the Administrative Procedure Act. The district board of trustees of each community college is the agency responsible for final action in

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[136] Phillips v. Santa Fe Community College, 342, So. 2d 108 (1977).

disputes concerning dismissal of instructional personnel. (2) The affected party may seek that administrative remedy, in the time and manner prescribed, without jeopardizing the judicial review secured to him by Section 120.68. Thus, Phillips' timely application for review by the Board of Education tolled the time for seeking judicial review; and, after the Board of Education sustained the Santa Fe trustees, Phillips had 30 more days in which to seek judicial review of the trustees' final action. In this case, the petition for review is dismissed, it appearing that Phillips' petition for review was filed more than 30 days after the decision of the Board of Education reviewing and sustaining the final agency action.

Issue of the legal effect of an oral contract of employment in the Junior College District of East Central Missouri arose in Neal v. Junior College District of East Central Missouri.[137]

Facts: Plaintiff taught education psychology as a part-time instructor at the Junior College during the 1973 spring semester, the 1973 summer session, the 1973 fall semester and the 1974 summer session. For the first sesssion plaintiff was personally contracted by Boyd H. Eversole, Dean of Academic Affairs, inquiring whether she wanted to teach educational psychology for the 1973 spring semester. Thereafter, communication from the school concerning plaintiff's teaching other sessions came through plaintiff's husband, Thomas L. Neal, then an instructor of psychology and sociology at the college. Thomas received his information from Terry A. Zanin, chairman of the division, who was relaying information from either Dean Eversole or Dean Edward B. Conway. During each session's registration, plaintiff and her husband kept track of the number of students who were signing up for the class because instructors were only paid the full salary if twelve or more students enrolled. If less than twelve students registered the class would either be dropped or taught by an instructor who was willing to be paid at a lower rate. In each session the course scheduled

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[137]Neal v. Junior College District of East Central Missouri, 556 S.W. 2d 580 (1977).

to be taught by plaintiff had enough students so that it was not dropped. No one ever officially told plaintiff to start teaching; she just showed up, knowing the class had enough students. In each session plaintiff signed a written contract several weeks after she had begun teaching the new class. Before the start of the 1974 fall semester plaintiff again received, but only through her husband, communication from the college inquiring as to plaintiff's interest in teaching the same course again. Plaintiff expressed interest and prepared for class and ordered books. During registration, however, plaintiff's husband was informed another instructor would be teaching educational psychology in place of plaintiff. The course was given but it was taught by this other person. Plaintiff made no complaint about the action of the college. Her husband, however, wrote a memorandum to Terry A. Zanin, division chairman, requesting that he request Dean Eversole to write plaintiff to the effect that if a class in educational psychology was to be taught the next semester (spring 1975) that plaintiff would be the one to teach it. Dean Conway responded by writing, in effect, that it was against school policy to give a commitment like that. Later plaintiff received the usual oral communication from the college inquiring about her availability to teach during the 1975 spring semester but again the class was taught by someone else. Plaintiff was unable to secure another teaching position either semester, despite her efforts. Plaintiff's husband testified that the communication he received from the college concerning plaintiff were inquiries as to plaintiff's availability, willingness and interest in teaching the course. Zanin testified that he only asked plaintiff's husband if plaintiff would be interested in teaching if the opportunity arose and that he had no authority to do more. The college President, Dr. Donald E. Shook, stated that deans had no authority to offer teachers a contract but could only locate faculty. He further stated that the college does not commit itself to part-time faculty (such as plaintiff) until after registration. Plaintiff agreed that the inquiries from the college were no more than requests as to her availability and interest. However, plaintiff believed from her past experience that if the college asked about her availability, then she would be the one to teach the class if it was given.

Issue: Does the record support the trial court's determination that there were no contracts between plaintiff and defendant for fall 1974 and spring 1975 semesters?

Decision: Yes.

Reasoning: The facts of this case do not compel a finding that there was an oral contract between the parties. There was sufficient evidence from which the trial court could find that there was no contract and such a determination is not against the weight of the evidence. Furthermore. although not advanced by defendant on appeal, 432.070, RSM 1969 requires that a teacher's contract must be in writing. This statute is mandatory and is a part of the substantive law. It was therefore necessary that plaintiff allege and prove a written contract to be entitled to judgment. All of the evidence proved there was no written contract between the parties for the fall semester of 1974 and the spring semester of 1975. The judgment is affirmed.

The following legal concepts are derived from Board of Trustees of the State College of Maryland v. Sherman: (1) Clear language of agreement will not give way to what parties thought agreement meant or intended it to mean and (2) When language of contract is clear, true test of what is meant is not what parties to contract intended it to mean, but what a reasonable person in position of parties would have thought it meant.[138]

Facts: On July 8, 1970, Dr. Sherman executed a form headed "Application for a Non Teaching Position," the "Non" having been inserted by someone above the title on the form. On July 14, 1970, she was hired for the school year beginning September 1, 1970. On March 3, 1971, Dr. Sherman addressed a letter to the President of Bowie in which she said

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[138]Board of Trustees of State Colleges of Maryland v. Sherman, 373 A. 2d 626 (1977).

she "would like to make formal application for the position as a professor in the graduate school program for the academic year 1971-1972." She added that if she were "accepted for such a position (she) would relinquish (her) function as Director of the Counseling Center." This was followed on April 15, 1971, by what was styled "Addendum to Faculty Contract" between Dr. Sherman and the college by which she was hired as a professor for the "ten month period, effective September 1, 1971." The addendum indicated that her "tenure status" would be probationary. It was on a prepared form which had "June 30, 1974," inserted after the statement, probationary period by ... The similar date of "July 1, 1972" was inserted on the "Current regulations require that you be notified concerning the termination of your addendum dated April 11, 1972, in which her salary was agreed upon for the school year beginning September 1, 1972. The latter form had on it, "A condition of offering this addendum is that you submit a statement waiving rights to tenure before July 1, 1975." This was done under date of April 24, 1972. The April 11, 1972 addendum was accompanied by a letter from the college president saying in pertinent part:

> Technically, you were employed at Bowie State College under the old system that required five years of service before attaining tenure; however, a new contract was issued to you which specifies a period of three years of service as a requirement for attaining tenure.
>
> I am prepared to extend your contract for another year only if it does not lead to tenure. If you accept these conditions, please submit to me by May 1 a written statement waiving rights to tenure before June 30, 1975.

On April 16, 1973, the last addendum was executed. It pertained to employment for the college year beginning September 1, 1973. It, too, referred to her having probationary tenure status and said that regulations required that she be notified concerning the termination of her probationary period before June 30, 1974. On June 6, 1973, the president of Bowie advised Dr. Sherman that it was his "unpleasant duty to inform (her) that (her) contract as a faculty member at Bowie State College" would be terminated "at the end of the (then) coming

academic year, after which it would not be renewed." He added, "This means that you will no longer be employed at Bowie State College after June 30, 1974."

Issue: 1. Is Sherman a tenured faculty member?
2. Did the university breach her contract?
3. Did the facts involve fraud and misrepresentation?

Decision: 1. No.
2. No.
3. No.

Reasoning: (1) This is a case of contract construction. The principles of which are well known and have been enunciated by this Court numerous times:

> the clear and unambiguous language of an agreement will not give way to what the parties thought the agreement meant or intended it to mean; where a contract is plain and unambiguous, there is no room for construction, and it must be presumed that the parties meant what they expressed; and when the language of a contract is clear, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

(2) For the first year of her full-time employment and therefore, the first year subject to the regulations, 1971-72, Dr. Sherman would be considered hired for the next "full academic year" (1972-1973) unless she received notice before March 1, 1972. Her contract was actually dated April 11, 1972. In her second year (1972-1973) she should be regarded as hired for the next "full academic year" (1973-1974) unless she was given written notice before December 15, 1972. Her contract was actually dated April 16, 1973. By these regulations, having been hired for the year 1973-74 (her third year) she would be considered hired for the next succeeding year, appointment for that 1973-74 school year. That appointment would expire June 30, 1974-75, unless written notice was given 12 months prior to the

> expiration of her 1974 contract. Notice had to be given her before June 30, 1973. This notice actually was given June 6, 1973. Accordingly, there was full compliance by the college and Dr. Sherman did not acquire tenure.

In conclusion, sixty of the 100 random sampled cases were in the area of faculty related case. Table 2, p. 216, indicated that in the sixty faculty related cases, only four of the areas of contract were in issue. The areas of Consideration, Capacity, Illegality and the Statute of Frauds were not litigated as major issues. Therefore, though there were approximately three times as many faculty related suits than students in the sample, student related suits covered a broader spectrum, in terms of area of contract involved in issues. A graphic representation of the distribution of the percentage of faculty issues, in the 100 cases in higher education as briefed in this chapter to the areas of the law of contract is found in Figure 2, page 217.

Institution Related

In Sterling v. University of Michigan in 1896, the court dealt with an issue relevant today, namely, did the legislature have the Constitutional right to interfere with or dictate the management of the university?[139]

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[139]Sterling v. Regents of University of Michigan, 68 N.W. 253 (1896).

TABLE 2

ANALYSIS OF 60 FACULTY-RELATED CASES ACCORDING TO THE AREAS OF THE LAW OF CONTRACT IN ISSUE

Higher Education Selected Cases / Related Area	Law of Contract							
	Expressed or Implied	Offer and Accept	Consideration	Capacity	Fraud, Mistake, Duress	Illegality	Statute of Frauds	Performance and Breach
Faculty (60)	5	8	0	0	3	0	0	44

Source: 100 Cases.

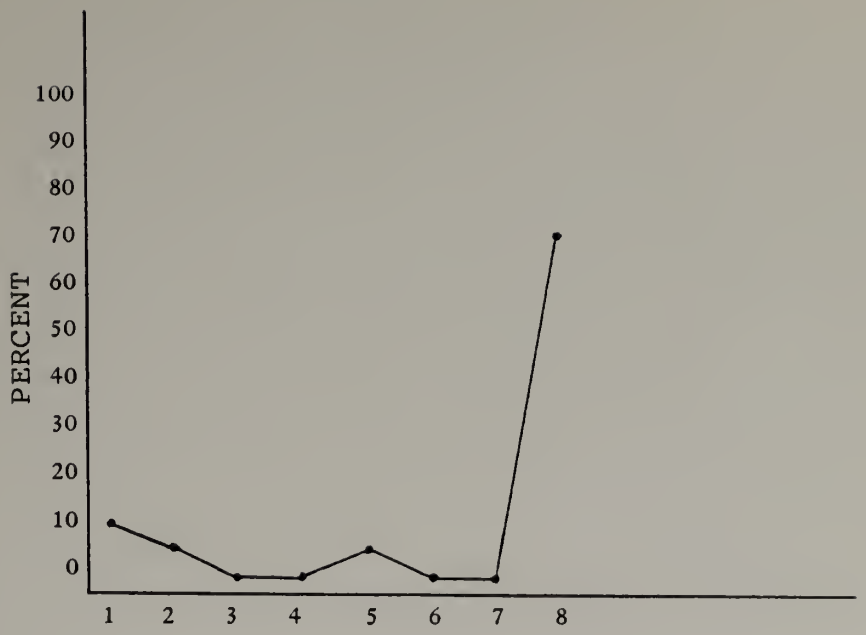

Figure 2. Distribution of the percentage of faculty issues in the 100 cases to the areas of the law of contract.

Legend:
1. Expressed or Implied
2. Offer and Acceptance
3. Consideration
4. Capacity
5. Fraud, Mistake, Duress
6. Illegality
7. Statute of Frauds
8. Performance and Breach

The fiscal autonomy of the University of Massachusetts has been a controversial issue in the legislature in the past few years and relates directly to the issue in this 19th century case. What is more relevant to this study is that the court in its dictum of this case relates directly to the State College in Massachusetts which had been a failure under management by the state, thereby citing the need for a Board of Regents to control the University of Michigan.

Facts: Mandamus by Charles Sterling to compel the Regents of the University of Michigan to comply with Act. No. 257, Pub. Act 1895, providing for the removal of the Homeopathic Medical College from Ann Arbor to Detroit. The Act No. 257, Pub. Act 1895 was passed by legislature in 1895. In summary, it authorized and directed the Board of Regents of the university to establish a Homeopathic Medical College as a branch or as a department of the university in Detroit and to discontinue the existing school in Ann Arbor. The Board of Regents claims: (1) that this act was not for the best interest of the university and (2) that the legislature did not have the Constitutional right to interfere with or dictate the management of the university.

Issue: Did the legislature have the Constitutional right to interfere with or dictate the management of the university?

Decision: No.

Reasoning: The Constitution of 1850 placed the university under the control of regents elected by the people. The legislature has no control over the university of the Board of Regents. It was not the intention of the framers of the Constitution to take away from the people the government of this institution. The designed and did provide for its

> management and control by a body of eight elected men by the people at large. They recognized the necessity that it should be in charge of men elected for long terms, and whose sole official duty it should be to look after its interest, and who should have the opportunity to investigate its needs, and carefully deliberate what things would best promote its usefulness for the benefit of the people. Some of the members of the Convention of 1850 referred in the debates to two colleges (one in Virginia and the other in Massachusetts) which had been failures under management by the State.

Diverse legal suits in contract have been litigated in the courts against the corporate institutions. As the following pages, through the medium of briefs and selected cases, show the diversity of the focus of the action, yet all actions are suits in contracts.

In the State ex rel. Sigall et al., v. Aetna Cleaning Contractors of Cleveland, Inc., the court set the following precedent for colleges and universities:

> Board of Trustees of a state university has the authority to enter into contracts with independent non-civil service employers to perform custodial services.[140]
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> Facts: This is an appeal from a decision of the Cuyahoga County Common Pleas Court permanently enjoining the further performance of a contract entered into between the Aetna Cleaning Contractors of Cleveland, Inc. (hereinafter "Aetna") and Kent State University (hereinafter "Kent State"). The contract in question provides that Aetna shall perform custodial services at thirteen Kent State buildings. Civil service employees, hired directly by Kent State, perform 75 to 80

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[140] State ex rel. Sigall et al. v. Aetna Cleaning Contractors of Cleveland, Inc. et al., 353 N.E. 2d 913 (1974).

percent of all the custodial work at Kent State. In some buildings civil service employees performed custodial duties during the day while Aetna custodial employees work at night. The civil service employees were paid $1.94 per hour at the time of the hearing before the trial court. Custodial employees in the classified civil service are assigned by statute a "pay range number." Testimony elicited at the hearing below indicated that the civil service custodial employees were paid a minimum of $2.55 per hour, plus fringe benefits. The trial court found that the contract in question was illegal in that it violated constitutional and statutory law of Ohio relating to civil service employment. Kent State, Aetna, the President of Kent State, and the various officers and members of the Board of Trustees of Kent State have perfected this appeal.

Issue: Was the contract illegal?

Decision: No.

Reasoning: It is possible that the Board of Education might provide for this janitorial service by an independent contract or by direct employment. There is nothing complex or difficult to understand about civil service laws and rules. The fundamental purpose is to establish a merit system, whereby selections for appointments in certain branches of the public service may be made upon the basis of demonstrated relative fitness, without regard to political considerations. To carry out this purpose elaborate rules have been formulated, designed to thwart the purposes of the civil services system, the Board of Trustees of a state university may lawfully contract to have an independent contractor perform services which might also be performed by civil service employees. Plaintiffs introduced no evidence tending to establish that the Board of Trustees of Kent State entered into the contract in a bad faith attempt to circumvent the purposes of the civil service system.

In Appel Media v. Clarion State College, the plaintiff terminated the installation of a television

distribution system after its work failed to meet contract specification. The issue related to plaintiff's compensation under the contract. The court held that plaintiff was not entitled to receive the full contract price but the contract price minus the cost of contract completion as provided in the contract plus interest.[141]

> Facts: On September 3, 1969, the Commonwealth of Pennsylvania acting through the Department of Property and Supplies (Department), accepted the bid of Appel Visual Services, Inc. (Appel Visual) for furnishing television distribution facilities at Clarion State College.
>
> Appel Visual's bid was $61,239. On October 15, 1969 the Director of Purchases for the department was notified that Appel Media, Inc. (Appel Media) would be assumed the contractural responsibility of Appel Visual for the installation of the system, Appel Media having recently contracted with Appel Visual to assume and perform contracts which had already been negotiated by Appel Visual and for which work had not yet been begun. Appel Media is a Pennsylvania corporation engaged in the business of installing and servicing audio-visual equipment and video systems for school and university use. Installation was begun by Appel Media in December of 1969, at which time the anticipated completion date was February 15, 1970. Problems in installation developed almost immediately, however, and there was a series of meetings and inspections during the ensuing months of 1970 which involved representatives of Appel Media, college personnel, engineers and a representative of the Attorney General. Finally, after an inspection on October 21 and 22 of 1970, the engineer commissioned by the department issued his inspection report, which detailed numerous defects. Appel Media

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[141] Appel Media v. Clarion State College, 327A 2d 420 (1974).

learned of this report and of the Department's intention to advertise for bids to complete the work, and then ceased any further efforts to complete the contract, leaving some of its materials on the premises. In November, the Department invited bids from other contracts to complete the installation of the system, and Telesonic Assoc. Inc. (Telesonic) was awarded a $40,000 contract for that purpose on March 21, 1971.

Appel Media filed a complaint in assumpsion with the Board of Arbitration of Claims (Board) to recover payment in full of the orginal contract price. After preliminary objections were filed and dismissed, a hearing was held on May 8-9, 1973. On October 25, 1973, the Board entered an order in favor of Appel Media in the amount of $24,139, a figure arrived at by subtracting the cost of completing the work from the original contract price and adding interest. Appel Media filed a timely appeal with this court, asserting that it is entitled to the entire contract price plus interest. Although Appel Media admits that the results of its work were not up the requirements of its contract, it asserts that it expended the time, labor, material and money called for in the contract and in accompanying plans and specifications. Appel Media blames its failure to produce the proper results on electrical grounding conditions which were peculiar to the site at Clarion State College, and which were known only by the defendant when Appel Visual's bid was accepted. Because Appel Media did not adequately cope with the grounding problems, there was a hum interference with the signals received over the system, so that a darkened line would appear across the television monitor. The hum interference exceeded that called for in the contract's performance specifications.

Issue: Is plaintiff entitled to receive the full contract price?

Decision: No. Judgment Affirmed.

Reasoning: (1) If one party knows or has good reason to know of the unilateral mistake of the other party to a contract, relief will be granted to the same extent as in the case of a mutual mistake. Here, however, the appellant has not shown that any agents of the Department knew that the appellant was acting under a misapprehension. (2) Our courts have clearly held that a party to a contract which has been breached by the other party may secure a substitute to complete the contract when the contract so provides. Appel Media here was clearly given a reasonable time to complete its contract by correcting the deficiencies in its work. The original completion date was in February of 1970 and complaints about the results of Appel Media's work were voided from that time through to the month of October.

Kramer, Judge (dissenting):

> I respectfully dissent for the basic reason that the majority opinion perforce must make its own findings of fact in order to substantiate the result. I would have little difficulty concurring if the Board of Arbitration Claims (Board) had made findings or conclusions that somehow Appel Media, Inc. had breached its contract with the Commonwealth. The problem is that no such findings or conclusions were made by the Board.

Jessen Associates v. Bullock was a suit involving a petition for writ of mandamus to compel the respondent Bob Bullock, Comptroller of Public Accounts, to issue a warrant on the State Treasury for $2,590.25 for architectural services performed by Realtor, Jessen Associates, Inc., for the University of Texas at Austin.[142] The basis for the controversy originated

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[142] Jessen Associates v. Bullock, 531 S.W. 2d 593 (1975).

in the senate bill.

The court ruled for colleges and universites in this case that it held:

> Legislature, by rejecting proposal that listing of various university construction projects upon which Board of Regents could spend funds appropriated elsewhere would not constitute approval of such construction projects by legislature, and accepting rider to general appropriations bill which expressly empowered board to expend funds appropriated elsewhere for various university construction projects, indicated that listing of such projects did constitute "legislative approval" within constitutional provision requiring such approval for university construction projects.

Facts: Comptroller of public accounts refused payment to architects for services performed on university construction project entered into pursuant to statute which comptroller alleged was invalid. Architects brought original petition for writ of mandamus against comptroller seeking order warranting payment. The Supreme Court, Greenhill, C.J., held that rider to General Appropriations Act which empowered Board of Regents to expend funds appropriated elsewhere for certain construction project was not "item of appropriation," and thus Governor's veto was ineffective; that rider did not contain "more than one subject" within meaning of constitutional prohibition against bills embracing various subjects; that legislative intent was clearly to approve expenditures of such funds on such construction projects; and the duty of comptroller to pay architects was clear, and thus writ of mandamus would lie.

Issue: Should the warrant be issued?

Decision: Yes.

Reasoning: A rider to the latest General Appropriations Act was not subject to the veto of the

Governor. The Governor has the power to veto an entire appropriations bill; but his power to veto part of an appropriations bill is limited to vetoing "items of appropriation." This rider, authorizing the construction of certain enumerated projects without the consent of the College Coordinating Board, was not intended by the Legislature to appropriate funds, and therefore was not an "item of appropriation" which was subject to veto apart from the remainder of the bill.

The University of Illinois was declared not to be a party to a contract which was in dispute and had no duty to indemnify the Illinois Building Authority for a possible adverse judgment in a breach of contract suit in Talandis Construction Corp. v. Illinois Building Authority.[143]

Facts: Appeal by State Building Authority from an order dismissing its second amended third party complaint against the university for indemnification for a possible judgment for the contractor who allegedly was damaged due to delay and work stoppages caused by indecision on the part of the authority and university. The Appellate Court held that the authority could only prosecute a third party action based on alleged tortious conduct on the part of the university, in the court of claims. That authority was not entitled to indemnification by university for judgments awarded against it because of breach affecting construction company based on lease agreement between authority and university; and that since university was a stranger to contract between authority and construction company the university did not have a duly, express or implied, to indemnify authority for possible adverse judgment based upon alleged breach of contract.

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[143]Talandis Construction Corp. v. Illinois Building Authority, 321 N.E. 2d 154 (1974).

Issue: Did the University have a duty to indemnify the authority for possible adverse judgment based on alleged breach of contract?

Decision: No.

Reasoning: (1) A stranger to a contract between two parties cannot be compelled to indemnify one of the parties for breach of contract absent the stranger's express agreement to so indemnify. (2) Where University was not a party to construction contract between state building authority and plaintiff contractor which was executed after lease agreement between building authority and University, the University, being a stranger to the construction contract, did not have a duty, express or implied, to indemnify authority for possible adverse judgment based upon alleged breach of contract on theory that University was in reality a party in interest in construction of animal clinic for use by the University under the lease.

The question of the power of the Board of Trustees of the University of Connecticut to enter into a contract which subjected classified state employees presently employed in the food service operation at the University to elimination of their positions was the issue in Connecticut State Employees Association et al. v. Board of Trustees of the University of Connecticut et al.[144]

Facts: State employees association, a chartered affiliate of the association consisting exclusively of state employees at the University of Connecticut and a group of individual food service employees at the University brought action to enjoin Board of Trustees of the University and various other state officials from entering into a contract with an

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[144]Connecticut State Employee Association v. Board of Trustees of University of Connecticut, 345 A. 2d 36 (1974).

independent food management contractor for provision of food dispensing service at the University and from dismissing individual plaintiffs and those similarly situated, claiming that proposed agreement violated state civil service law. The Superior Court, Hartford County, Parskey, Jr, entered judgment for plaintiffs, and defendants appealed. The Supreme Court, MacDonald J., held that State Personnel Act for reasons of economy and efficiency, did not preclude Board of Trustees of University of Connecticut from entering into a contract with an independent food management contractor, thereby subjecting classified state employees presently employed in food service operation at University to elimininination of their positions.

Issue: Does the State Personnel Act, chapter 67 of the General Statutes, preclude the Board of Trustees of the University of Connecticut from entering into a contract with an independent food management contractor, thereby subjecting the 240 classified state employees presently employed in food service operations at the University of Connecticut to the elimination of their positions?

Decision: No.

Reasoning: (1) State Personnel Act did not preclude Board of Trustees of University of Connecticut from for reasons of economy and efficiency, entering into a contract with an independent food management contractor, thereby subjecting classified state employees presently employed in food service operation at university to elimination of their positions. (2) Statute giving board of trustees of University of Connecticut power to make rules for government of university and to determine general policies of university was intended to clothe the board with sole jurisdiction over the university in all phases. (3) Statute giving board of trustees of University of Connecticut power to make rules for government of university and to determine general policies of university was intended to grant to the board authority to exercise complete direction and restraint over the actions of those connected with university, including the teaching staff, employees and students. (4) Under statute giving board of trustees of University of Connecticut power to make

rules for government of university and to determine general policies of university, the board has authority to make policy decisions regarding status of food service system.

The issues of a waiver of contract or estoppel were two of the legal issues in Board of Regents of the University of Texas v. S. & G. Construction Company.[145]

Facts: Builder brought action against the University Board of Regents to receive additional compensation after completing construction of married students' apartments pursuant to contract with Board. The 126th District Court, Travis County, James R. Meyers, J., awarded builder $837,674.90 in damages, plus interest, and also awarded builder the $12,000 portion of contract price withheld as liquidated damages for late completion of project, and Board appealed. The Court of Civil Appeals, Phillips, C.J., held that failure of Board to provide builder with "correct plans and specifications and additional instructions and detail drawings as were necessary to carry out the work" was a breach of contract entitling builder to recover its additional costs, that builder's decision to stay on the job despite Board's breach of contract was not a waiver or basis for an estoppel to assert builder's claim for damages for such breach, that judgment permitting builder to recover its additional costs did not constitute "extra compensation for services rendered" pursuant to a valid written contract or constitute "a gift or donation" in violation of state constitutional provisions, that amending of a written charge to jury by changing definition of certain phrases was proper, that certain rule did not preclude trial court from correcting an error in a charge after oral argument, that builder could be awarded interest on judgment from date project was completed and that award to builder of the sum withheld as liquidated damages was proper.

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[145]Board of Regents of the University of Texas v. S. & G. Construction Co., 529 S.W. 2d 90 (1975).

Issue: Did Appellant breach the contract?

Decision: Yes.

Reasoning: (1) Builder's decision to stay on the job despite breach of contract, in failing to provide builder with "correct plans and specifications and additional instructions and detail drawings as were necessary to carry out the work" as required by contract was not a waiver or basis for an estoppel to assert builder's claim for damages for such breach and (2) If a party breaches its contract, the other party is put to an election of continuing or ceasing performance; any action indicating an intention to continue will operate as a conclusive choice, not depriving injured party of his cause of action for breach which has already taken place, but depriving him only of any excuse for ceasing performance on his own part.

A proposal to accept an offer which contains terms differing from the offer is a rejection of the offer. This was the rule of law in Board of Governors, Etc. v. Buildings Systems, Etc.[146]

Facts: In May of 1972 the board of governors of the university authorized the construction of a 257-unit apartment structure to be built on the campus. Bids were solicited and received. The scheduled closing time for receiving bids was 2 p.m., July 25, 1972. The defendant Building Systems submitted the low bid of $4,824,000. In accordance with the plaintiff's advertisements, Building Systems submitted a surety bond executed by American Insurance Company in the amount of five percent of the bid. On August 10, 1972, the board of governors passed a resolution awarding the general contract to Building Systems "subject to review and concurrence by the Department of Housing and Urban Development (HUD), and to the sale and delivery of bonds***." That same day a letter

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[146]Board of Governors v. Building Systems Housing Corporation, 233 N.W. 2d 195 (1975).

was sent to Building Systems informing it of the board's decision including the two conditions. The letter stated further:

> As soon as the University receives approval from the Department of Housing and Urban Development in the award of this contract, we will be in touch with you to make the final arrangements for executing the necessary contract documents.

Although Building Systems advertised for the submission of subcontractor bids, it thereafter decided not to continue with the project. By a letter dated August 30 and received August 31, 1972, Building Systems informed the board that it was withdrawing its bid 'pursuant to the terms of the bid proposal and the advertisement for bidders.' At that time, the University had not received approval of defendant's bid from HUD.

Thereafter, the plaintiff almost immediately informed Building Systems that it considered the corporation's conduct to be an anticipatory breach of the contract. On September 8, 1972, the board awarded the general contract to the second lowest bidder for $5,090,000. Subsequently, the University demanded payment from defendants of $266,000 damages measured by the difference between the defendant's bid and that of the next lowest bidder. Upon a refusal to pay, the plaintiff instituted this suit. On April 19, 1974, the trial court entered an order granting final summary judgment in favor of the defendant surety, American Insurance Company, and partial summary judgment in favor of defendant Building Systems. From this order, plaintiff appeals.

Issues: 1. Was the bid an offer impliedly proposing that the University make a conditional promise as part of its acceptance?
2. Was the "withdrawal" of Building Systems bid a breach of contract?

Decisions: 1. No.
2. No.

Reasoning: (1) In order to establish a valid contract, the offeree's acceptance must:

> ***in every respect correspond substantially with the identical offer made. The acceptance must be absolute and unconditional, and, if conditions are attached or it differs from the offer, the transaction amounts only to a proposal and a counter proposal.[147]
>
> (2) A proposal to accept an offer which contains terms varying from that of the offer is a rejection of the offer. The surety contract provided for the termination of the surety's responsibility if the bid should be rejected or if the bid was accepted and a formal contract was executed. The offeree's acceptance was conditioned upon, at the least, the sale and delivery of financing bonds, constituted a counter-proposal and thus a rejection.

The court held that an agreement by the Utah State University to purchase common stock with public funds in its possession and to pay a commission to a broker was ultra vires and unenforceable, in First Equity Corp. of Florida v. Utah State University.[148]

> Facts: Plaintiff is a stock broker who brought action to recover commissions and other money lost as a result of the refusal of state university to accept and pay for common stock ordered by the Assistant Vice President of Finance of Utah State University. Lower courts granted summary judgment for the University. Plaintiff appeals.
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> Issue: Does the University have the power to purchase common stock with public funds in its possession?
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> Decision: No.

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[147] Marshall Manufacturing Co. v. Berrien County Package Co., 257 N.W. 714 (1934).

[148] First Equity Corp. of Florida v. Utah State University, 544 P 2d 887 (1975).

Reasoning: USU according to the court had no power to enter into an agreement for the purchase of common stock. It held that "the agreement to purchase and pay commissions thereon are ultra vires agreements and unenforceable."

The court further pointed out that municipal corporations are not bound by contracts made without authority or in excess of the power of the corporation. 'One who deals with a municipal corporation does so at his peril.'

Action for damages to college campus allegedly loaned under contract with City of New York for use by model cities project could not be defeated on ground that executive order of mayor which created model cities administration called for approval of all contracts by mayor, in view of fact that City, in its own suit papers, spoke of having "contracted" with college was the holding in Barber-Scotia College, Inc. v. City of New York.[149]

Facts: The plaintiff in this action, Barber-Scotia College, Inc. ("Barber-Scotia") contracted with Central Brooklyn Model Cities ("CBMC") to make available Barber-Scotia's North Carolina campus for a summer educational program in 1972. Pursuant to the agreement, CBMC sent more than 200 students and faculty members to Barber-Scotia from June 28, 1972 until August 18, 1972. This suit was begun to recover the cost of repairs for damage allegedly done to the college during the course of the summer program. The defendant, City of New York, has moved to dismiss the complaint. The City argues that plaintiff's failure to file a notice of claim with the Corporation Counsel within 90 days of the alleged injury forecloses the action on the tort count of

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[149] Barber-Scotia College, Inc. v. City of New York, 390 F. Supp. 525 (1975).

the complaint. The plaintiff contends that its failure to file a timely notice of claim is no bar to its action since the defendant is estopped, by reason of its settlement representations, from asserting the failure. Moreover, plaintiff contends that the purpose of the statute has been met since the defendant received prompt actual notice of the claim.

Issues: 1. Is failure to file a timely notice of claim a bar to plaintiff's action?
2. Was the purpose of the statute met?
3. Did Mayor have to approve contracts?

Decisions: 1. No.
2. Yes.
3. No.

Reasoning: (1) It is clear from the communications and actions that took place in August and September 1972 that representatives of the City were aware of the claim. Further, they indicated that they were processing the claim. Clearly the City had both prompt notice of and an opportunity to investigate the claim so that the legislative purpose of Section 50-e has been accomplished. (2) Moreover, the acknowledgment of the damage by CBMC's on-site representative and the September 14th letter from CMBM were clearly relied upon by plaintiff as indications that the matter would in fact be settled. For this reason, the plaintiff, which was unaware of any claim-filing requirement, did not even engage an attorney until much later when it became apparent that the City was not going to pay for the damage. Representations by City agents, on which plaintiff relied, that the matter would be resolved, estop the City from now asserting the plaintiff's failure to file as a defense to the action. (3) The City also tried to defeat the contract count on the ground that the Executive Order of the Mayor (No. 8 dated April 15, 1970), which created the Model Cities Administration, calls for approval of all contracts by the Mayor. This argument was raised as an afterthought in a late addition to the City's reply memorandum. The argument fails since in its own papers the City speaks of having "contracted" with the plaintiff.

In Curator of University of Missouri v. Nebraska Prestressed Concrete Co., the court defined "quantum meruit" as "as much as he has deserved."[150]

Facts: Quantum meruit action by plaintiff subcontractor against defendant subcontractor, general contractor as principal on performance bond, and insurance company as surety, for work performed in constructing fieldhouse. The City of St. Louis Circuit Court St. Louis City, Michael J. Scott, J., entered judgment in favor of plaintiff subcontractor for $67,000 and defendant subcontractor appealed. The Court of Appeals, Gunn, J., held that evidence was sufficient to support finding that defendant subcontractor, which had contracted with plaintiff subcontractor for installation of precast concrete exterior wall and seating units in fieldhouse and which had obligation to provide suitable access work areas for material and trucks, breached contract; that plaintiff subcontractor was therefore entitled to recover reasonable value of work and labor furnished; but that award was excessive

Issue: Was plaintiff subcontractor entitled to recover the reasonable value of work and labor furnished for breach of his contract?

Decision: Yes. Judgment for plaintiff on issue of liability affirmed. Issue on damages remanded.

Reasoning: (1) A quantum meruit action brought by contractor, if contractor was prevented from completing contract because of owner's breach, contractor is entitled to recover reasonable value of work and labor furnished and in a quantum meruit action brought by defaulting contractor, contractor's recovery may be reduced, under proper pleading and proof, by amount of damage his breach of contract may have occasioned to owner; contractor may not recover in excess of contract price in such a case. (2) Merely walking off a job is not breach of contract as matter of law. When owner, or someone standing in

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[150]Curator of University of Missouri v. Nebraska Prestressed Concrete Co., 526 S.W. 2d 903 (1975).

his stead, prevents contractor from completing performance, contractor's failure to complete work is excused, and he is not regarded as having breached a contract; contractor, under such circumstances, has right to sue on contract or in quantum meruit for reasonable value of labor and work furnished.

The State University Construction Fund of New York awarded a single rather than separate contracts for the erection of a building at the State University campus at Stony Brook. In Hvac and Sprinkler Contractors Ass'n, Inc. v. The State University Construction Fund, the court upheld the discretion of the Construction Fund to issue a single contract.[151]

Facts: Plaintiff brought Article 78 proceeding challenging action of the State University Construction Fund in seeking bids on entire building contract rather than soliciting separate bids for each of the specific subdivisions of work to be performed. The Supreme Court held that the sections of the Education law specifically permitting the Fund to award one contract for all the work to be performed controlled over the prior general statute which required the state to solicit separate bids for each of the three specific subdivisions of work. It also held that the Fund did not abuse its discretion in choosing to award a single rather than separate contracts on the theory that in a large size contract single contracting is prejudicial to small contractors.

Issue: Is Education Law 376 (7), L196 2c 251 void because it conflicts with State Finance Law Section 135?

Decision: No. Motion Dismissed.

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[151]Hvac and Sprinkler Contractors Ass'n., Inc. v. The State University Construction Fund, 364 N.Y.S. 2d 422 (1975).

Reasoning: The court reasoned that it is a matter of hornbook statutory interpretation that if two acts cannot be read in harmony with each other, a prior general statute must yield to a later specific one. The legislature in approving Education Law section 376 (7) in 1962, certainly was aware of State Finance Law Section 135. By enacting the Education Law, the legislature created a specific instance which is controlling here.

In Green v. Richmond, the following concept of the law of contract was held where there is disputed evidence as to the terms or performance of an orgal agreement, or meaning of words used by the party, this matter should be left for the jury.[152]

Facts: An action in the nature of quantum meruit against the personal representative of the estate of decedent to recover for services rendered by the plaintiff in reliance on the decedent's oral promise to leave a will bequeathing his entire estate to her. The Superior Court entered judgment for plaintiff and defendant appeals.

Issue: Was the oral agreement illegal on the theory that it included sexual intercourse or cohabitation as part of the consideration?

Decision: No.

Reasoning: The court indicated that the oral agreement involved a promise to make a will, and as such was not binding. However, if the oral agreement was legal and not contrary to public policy, the plaintiff could recover the fair value of her services. From the totality of the evidence, the jury was warranted in inferring that the illicit relations were not part of the contract, and were not more than an incidental part of the plaintiff's performance.

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[152]Green v. Richmond, 337 N.E. 2d 691 (1975).

In Board of Trustees of Howard Community College v. John K. Ruff, Inc., the court held that the Board of Trustees of community college was agency of state and therefore doctrine of sovereign immunity applicable to state was also applicable to board; however, General Assembly directly waived sovereign immunity of Board, but sovereign immunity would still be defense, despite waiver, to suit brought for money judgment in assumpsit under contract against board unless funds were appropriated for that purpose or board could provide funds by taxation.[153]

> Facts: Early in April 1974 the Board invited general contractors to bid on the construction of a Nurse Education Facility for the College under designated terms, conditions and specifications. Ruff was among those who responded to the invitation, and its fixed-sum bid of $2,088,100 was accepted. Thereupon, the Board and Ruff entered into a written contract on 28 June 1974, using the American Institute of Architects standard form of agreement between Owner and Contractor where the basis of payment is a stipulated sum. Included in the enumerated documents was "Project Manual for General Construction Work for Nurse Education Facility, Howard Community College, dated April 1, 1974, in its entirety." In establishing the fixed-price amount of its bid, Ruff did not include any sums representing Maryland sales tax on the purchase of materials for the construction of the facility, and the subcontractors who agreed with Ruff to perform part of the work covered by Ruff's contract with the Board, did not include any such sums in their bids. Pursuant to Specification 1.24.-02 the Board gave Ruff Exemption Certificate No. 08798. It had been issued

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[153] Board of Trustees of Howard Community College v. John K. Ruff, Inc., 366 A. 2d 360 (1976).

by the Comptroller of the Treasury on 13 April 1970 and authorized exemption from payment of sales tax on those purchases of taxable personal property or services purchased for use in carrying on the work of the Board. The construction of the facility began.

It appeared thereafter that the facility construction project was not exempt from Maryland sales tax. The Comptroller of the Treasury so informed Ruff and its subcontractors. On 23 September 1975 the State filed a tax lien against Ruff for sales tax due from 23 September through December 27, 1974, plus penalties and interest, and the subcontractors, complaining that they had bid on the basis of sales tax exemption, demanded that Ruff adjust their contracts to include additional sums for sales taxes paid and to be paid by them. The Board refused to increase the contract sum to cover the sales tax paid and payable to complete the work under the contract. On 2 October 1975 Ruff instituted the declaratory judgment action against the Board. After Answer by the Board, Ruff moved for summary judgment. The court below granted the motion and on 19 April 1976 made its declaration of the rights of the parties. The doctrine of sovereign immunity was not considered.

Issues: 1. Was there a breach of contract?
2. Is money available to the Board in an amount sufficient to satisfy a money judgment for the sales tax?

Decisions: 1. Yes.
2. Unknown - Remanded

Reasoning: (1) The agreement called for Ruff to perform certain work for the Board at a stipulated sum, arrived at by Ruff and accepted by the Board on the Board's assurance written into the contract, that no sales tax would be payable by Ruff on materials purchased to perform the work. The charge on Ruff to pay sales tax on such materials breached the contract. Ruff was entitled to damages payable by the Board in the amount of the sales tax paid by Ruff to the State or to its subcontractors for the sales tax they were obliged to pay on such materials. (2) If funds are available, the waiver of sovereign immunity is complete, and an action for a money

> judgment for breach of the contract would lie. On the other hand, if funds are not available, such action would be precluded by the application of the doctrine of sovereign immunity. As we are not able to resolve the issue on the record before us, we remand the case under Rule 871 a for further proceedings as if no appeal had been taken.

Where plaintiffs contracted for right of first refusal for five years and vendors then accepted offer from college to purchase but, when college learned of agreement with plaintiffs, offer of sale and acceptance were withdrawn by mutual consent and college then leased premises for term which would extend until plaintiff's right of first refusal had expired, and for $10,000 college was given exclusive option to purchase, this $10,000 payment to be credited on purchase price, there was contract denominated lease in hope of circumventing plaintiff's right, and plaintiff's right of first refusal was activated; specific performance was appropriate remedy was the holding in Quigley v. Capalongo.[154]

> Facts: Appeal from a judgment of the Supreme Court in favor of defendants, entered March 26, 1975 in Tompkins County, upon a decision of the court at a Trial Term, without a jury. In July, 1967, the defendant-owners sold to the plaintiffs certain land in the City of Ithaca, and, pursuant to the agreement, it was further provided with respect to the property presently in dispute that if defendants receive a bona fide written offer for the purchase of this property during a period of five years, they

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[154] Quigley v. Capalongo, 383 N.Y.S. 2d 935 (1976).

would offer the property to plaintiffs on the same terms and conditions. In April, 1968, defendant-owners accepted an offer from Defendant Ithaca College to purchase the property in question for $47,000. However, when the College learned of the agreement with plaintiffs, the offer of sale and acceptance were withdrawn by mutual consent.

With the agreement with plaintiffs in mind, the owners and the College entered into a lease of the premises for a term running from July, 1968, to June 30, 1973. The term of the lease was thus to run until after the plaintiffs' right of first refusal expired. Ithaca College was further given, in consideration of the sum of $10,000 paid by them upon execution of the lease, an exclusive option to purchase the premises between January 1, 1973 and the end of the lease for $47,000, against which the $10,000 payment would be credited. The lease called for rental of $1,000 per year and contained a covenant that the owners would not sell or transfer the premises to anyone other than the College during the term of the lease. It is conceded that plaintiffs were never notified of any of these transactions. The College exercised its option in June of 1973, but prior to transfer of title, plaintiffs commenced this action seeking specific performance of the agreement to give them the right of first refusal.

Issues: 1. Was there a breach of contract?
2. Should specific performance be decreed in favor of the plaintiff?

Decisions: 1. Yes.
2. Yes.

Reasoning: (1) A right of first refusal is an option to buy conditioned on the seller's willingness to sell. It is not an absolute agreement to sell to the optionee, but merely an agreement that should the owner receive a bona fide offer to purchase the property during the term of the option, he will not accept the offer without giving the optionee the right of first refusal. There was a breach of contract. Defendant-owners, as the court found, desired and intended to sell their property to Ithaca College, a willing buyer, in 1968 and were foreclosed from doing so only by the contract with plaintiffs.

> While plaintiffs' right to purchase the property might never have ripened into an absolute one, defendant-owners owed them the obligation of dealing in good faith. Defendants breached that obligation by entering into a contract, denominated a lease in the hope of circumventing plaintiffs' rights, but which, upon examination of all the facts and circumstances of this case actually reduced the defendants' present intention of selling the property to a contract under which the actual transfer of title would be postponed. (2) In the circumstances of this case it formalized defendant-owners' intention to sell the premises in response to the offer by defendant Ithaca College, thus activating plaintiffs' right of first refusal. Since the College participated in these transactions with full knowledge of plaintiffs' rights, specific performance, upon tender by plaintiffs of such amounts as have been paid and would be required to be paid by the College, is an appropriate remedy.

In Trustees of Stigmatine Fathers, Inc., the court ruled that the trial court did not abuse its discretion in denying motion for relief from judgment, declaring that contract for purchase of plaintiff's land and building by state for educational purposes was valid, and that neither the Governor nor the Secretary of Administration and Finance was authorized to decline, as matter of discretion, to allot necessary funds, on ground that appraisal of property was insufficient, when no issue was raised with respect to such appraisal until a year after the trial and then was asserted as an afterthought.[155]

> Facts: Plaintiff filed a bill in equity seeking enforcement of a contract for purchase of his property by the state for educational purposes, when the

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[155] Trustees of Stigmatine Fathers, Inc. v. Secretary of Administration and Finance, 341 N.E. 2d 662 (1976).

Secretary of Administration and Finance refused to allot appropriated funds in contravention of a prior judgment declaring that the contract was valid and that neither the Governor nor the Secretary of Administration and Finance was authorized to decline, as a matter of discretion, to allot the necessary funds. The Superior Court entered judgment for the plaintiffs. The defendant appealed raising for the first time the issue that the appraisal report was not acceptable on its face.

Issue: May an issue be raised for the first time before the Supreme Judicial Court?

Decision: No.

Reasoning: The court held that an issue may not be raised for the first time before the Supreme Judicial Court. The appraisal in the present case was required by statute in connection with a voluntary purchase rather than a taking by eminent domain, and rules of evidence and damages are not directly applicable to it. The purpose was to provide a check on the judgment of the acquiring agency to verify the reasonableness of a negotiated value. We think it was sufficient if the appraisal provided the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.

The Refrigeration Company which assertedly had not been paid for air-conditioning unit which it installed on premises of college was not entitled to punitive damages in absence of evidence sufficient to establish that persons who purported to act for the college had actual or apparent authority to contract for the college was the holding in Tuskegee Institute v. May Refrigeration Company, Inc.[156]

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[156] Tuskegee Institute v. May Refrigeration Co., Inc., 344 So. 2d 156 (1977).

Facts: May Refrigeration Company installed an air-conditioning unit at Tuskegee Institute, but was never paid for it. Nevertheless, Tuskegee kept the unit and used it. May filed suit against Tuskegee and its agents. A jury awarded $2,975 compensatory damages, and $3,500 punitive damages. Tuskegee appealed, and the Court of Civil Appeals reversed, holding that the evidence was insufficient to show that any employee of Tuskegee had actual or apparent authority to bind it. Plaintiff contends that it furnished an air-conditioning system for the defendant, Tuskegee Institute, said air-conditioning system having been contracted for in writing by and between plaintiff and defendant, William B. Shell, an employee of Tuskegee Institute; that the defendant, Tuskegee Institute ratified the action of the defendant, Wiliam B. Shell, in various oral conversations between representatives of the plaintiff and representatives of the defendant, Tuskegee Instiute, including but not limited to, the defendants, William B. Shell and T. J. Pinnock. Plaintiff further contends that all work, labor and materials agreed to be furnished or performed by the plaintiff have been furnished or performed in full. Plaintiff contends that the defendants, William B. Shell, T. J. Pinnock and Tuskegee Institute, have conspired to defraud the plaintiff; and in fact the defendants, Shell, Pinnock and Tuskegee Institute, never intended to pay the plaintiff for the air-conditioning system provided by it.

Issue: Could plaintiff ratify Pinnock and Shell's acts even though the evidence was 'insufficient to show' that they had "actual or apparent authority to bind him"?

Decision: Yes.

Reasoning: It is apparent that this Court, In City Stores, recognized that if a principal has knowledge of acts performed on its behalf, even though unauthorized, then the principal can ratify those acts, was the reasoning of the court. Where a person acts for another who accepts or retains the benefits or proceeds of his efforts with knowledge of the material facts surrounding the transaction, such other

> must be deemed to have ratified the methods employed, as he may not, even though innocent, receive or retain the benefits of, and at the same time disclaim responsibility for, the measures by which they were acquired. This general principle applies, for example, to an unauthorized contract effected, an unauthorized sale or lease of property made, or an unauthorized loan procured on behalf of the principle or purported principal. If the agent procures a contract by fraudulent or corrupt practices, although the principal has not been privy in any way to such conduct of his agent, yet by claiming the benefit of the contract, he must take it tained as it may be with such practices.

Where court annulled award of contract for amusement games for Community College, award of the contract to petitioner as the only other bidder would have been an improper usurpation of administrative role by prohibiting Community College and Faculty Student Association from exercising their discretionary power of rejecting all bids and readvertising was the holding in DeBonis v. Hudson Valley Community College.[157]

> Facts: The Faculty Student Association of Hudson Valley Community College (hereinafter FSA) advertised for bids on "skill and amusement games." The "Information for Bidders" with respect thereto provided that bids would be received by the Board of Trustees of the Hudson Valley Community College (hereinafter HVCC); that bids should be addressed to James J. Fitzgibbons, President of HVCC, and that no contractor to whom the contract was awarded could assign, transfer or otherwise dispose of his right, title or interest therein without the previous consent in writing of HVCC. Both the "Information for Bidders" and the advertisement for bids provided that the Board of Trustees reserved the right to reject

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[157] DeBonis v. Hudson Valley Communtiy College, 389 N.Y.S. 2d 647 (1976).

any and all bids, and to waive all formalities in a bid. The bid form to be utilized required the bidders to fill in the percentage of the revenues from the amusement games which they would retain. Petitioner filled in 39 percent while William C. Lewis doing business as Lewis Amusements, the only other bidder, filled in 50 percent and added at the bottom of its bid that it would guarantee FSA a minimum of $14,000 per year. The contract was awarded to Lewis and petitioner began this proceeding to have the award of the contract annulled and to have itself declared to be the lowest responsible bidder within the meaning of section 103 of the General Municipal Law and, therefore, the successful bidder. Special Term annulled the award of the contract and remanded the matter to HVCC and James Fitzgibbons as president of FSA.

Issue: Is the award of the contract governed by section 103 of the General Municipal Law?

Decision: Yes.

Reasoning: HVCC so united itself with the FSA in the advertising for bids and awarding of the contract that section 103 applies. While section 103 mandates the contract being awarded to the lowest responsible bidder, where a bidder substantially varies his bid from the specifications it cannot be considered in determining the lowest responsible bid. While General Municipal Law section relating to award of public work contracts mandates the contract being awarded to lowest responsible bidder, where bidder substantially varies his bid from specification it cannot be considered in determining lowest responsible bid.

In conclusion, eighteen of the 100 cases were in the area of institution related cases. These cases involved issues in six out of the eight areas of contract. Thus, the related area with the fewest cases (having four cases less than the student related cases) covered the largest number of areas in relation to the areas of the law

of contract in issue. It involved one more area than the student related ones, leaving the areas of Fraud, Mistake and Duress, and the Statute of Frauds as the only ones not so treated (Re: Table 3, page 247).

A graphic representation of the distribution of the percentage of student issues, in the 100 cases in higher education as briefed in this chapter, to the areas of contract is found in Figure 3, page 248.

Massachusetts General Laws

Public Higher Education

Public higher education as one segment of the governmental system in the Commonwealth is a creature of statute. As such, the financial basis for its operation is found in the Massachusetts Constitution, Article 63, sec. 1. All revenue collected through an institution of public higher education with the exception of its trust funds are paid into the general fund.

Restrictions on administrative officers in government and institutions of public higher education in making a permanent contract are set forth in Ch. 29, sec. 27.

M.G.L.A., Ch. 29, sec. 29 provides for Interchanging Funds. Section 29A provides for: Rules and regulations regarding employment and compensation of consultants; forms;

TABLE 3

ANALYSIS OF 18 INSTITUTION-RELATED CASES ACCORDING TO THE AREAS OF THE LAW OF CONTRACT IN ISSUE

Higher Education Selected Cases / Related Area	Law of Contract							
	Expressed or Implied	Offer and Accept	Consideration	Capacity	Fraud, Mistake, Duress	Illegality	Statute of Frauds	Performance and Breach
Institution (18)	5	3	1	2	0	2	0	5

Source: 100 Cases.

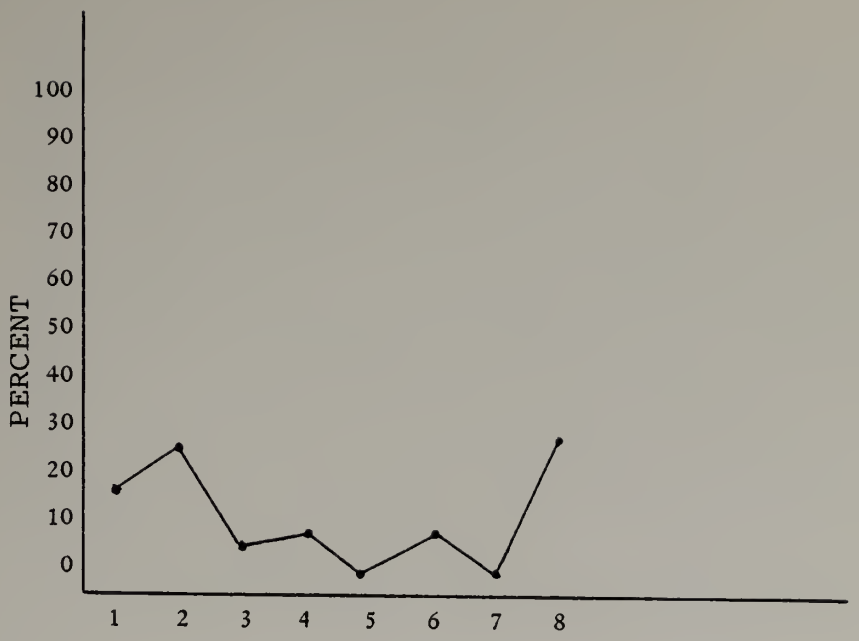

Figure 3. Distribution of the percentage of institutional issues in the 100 cases.

Legend:
1. Expressed or Implied
2. Offer and Acceptance
3. Consideration
4. Capacity
5. Fraud, Mistake, Duress
6. Illegality
7. Statute of Frauds
8. Performance and Breach

contracts; payments; and restrictions. The payment of faculty salaries and annuity contracts as part of the employment contract are set forth in section 31 of Chapter 29.

Department of Education--Board of Higher Education

M.G.L.A., Ch. 15, sec. 1 establishes the Department of Education in the Commonwealth. In this department, section 1A of this Chapter establishes the Board of Higher Education while section 1D defines its purpose, powers and duties. Subsequent sections of Chapter 15 set forth the organizational structure of public higher education.

Universities

University of Massachusetts. Chapter 75, sec. 1, of the M.G.L. sets forth the status and governing body of the University of Massachusetts. This section creates autonomous authority in the University. The power of the trustees of the University of Massachusetts are set forth in section 2. The administrative functions of the Board of Trustees are set forth in sections 3 and 3A. Section 3A provides for the delegation of the trustees' authority or of any portion of it to the president or other officers of the University. This signatory power to contract may be delegated by the trustees to the president or other officers of the University whenever in their judgment such

delegation may be necessary or desirable.

Southeastern Massachusetts University. Chapter 75B., sec. 1 of the M.G.L. sets forth the educational programs; degrees; status; and governing body of the university. Section 3 provides for the delegation of authority by the trustees to the president or any officer of the university whenever in their judgment such a delegation may be necessary or desirable. Thus, the trustees have the statutory power to delegate the contractural right to the president or other officer of the university.

University of Lowell. Chapter 75A., sec. 1 of the M.G.L. sets forth the purposes; status; and governing body of the University of Lowell. Section 1A provides for the delegation of authority of the Board of Trustees. This section provides for the general delegation of their authority to the president or any officer of the university whenever in their judgment such delegation may be necessary. Therefore, their contractual rights may be delegated.

State Colleges

Chapter 73 of the M.G.L. provides for the State Colleges. Section 1 of this Chapter defines the management; administration of the State College System. It pro-

vides for the delegation of contractural authority to the Director of the Division of State Colleges or to the officers of the State Colleges whenever in their judgment such delegation may be necessary or desirable. Section 14 defines the contractural power of the Board of Trustees.

Regional Community Colleges

Chapter 15, sec. 27 of the M.G.L. provides for the establishment of the Massachusetts Board of Regional Community Colleges in the Department of Education. At the same time, it removes the Board from the control of the Department of Education. Section 29 delineates the duties of the Board and vests contractural power within it as this section provides for self-governance by the Board of Regional Community Colleges and the exercise of such authority customarily and traditionally exercised by governing boards of institutions of higher learning.

Law of Contract

A contract may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other and each reciprocally acquires a right to whatever is promised by the other.[158] It is a promise or a set of promises to which the law attaches a legal obligation.[159] The "requirements of a bargain" under section 19 of the Restatement, Contract now provide that "the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."[160]

The essential elements of a contract are a(n): (1) offer and acceptance (mutual assent); (2) capacity of the parties to contract; (3) valid (sufficient) consideration; (4) legal agreement (not declared void by statute or common law); (5) writing, if required by the Statute of Frauds.[161]

Contracts, traditionally, have been classified as: (1) "formal" and (2) "informal."[162] "Formal" contracts are:

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[158] Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

[159] Restatement, Contracts, sec. 1.

[160] Ibid., Restatement, sec. 19.

[161] Ibid.

[162] Ibid., sec. 7-11.

(1) contracts under seal; (2) recognizances (certain undertakings such as bail bonds); and (3) negotiable instruments.[163] All other contracts are "informal" contracts.[164]

The intent of the parties to a contract must be determined from the fair construction of the contract as a whole. Justice, common sense and the probable intent of the parties are guides in the court's construction of a written agreement. If the words of a contract are plain and free from ambiguity, they must be construed in accordance with the ordinary and usual meaning.[165]

The construction of words in a carefully drawn document may be affected by various use of words in another part of the document. If there is a question in ambiguous language, it is a question of law for the court to determine.[166]

If general words come after specific words in enumerations describing a legal subject, the general words will be construed to include only the subjects similar in nature to those objects listed by the specific words.[167] The literal

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[163]Ibid.

[164]Ibid.

[165]Fried v. Fried, 368 N.E. 2d 1222. (1977).

[166]Fried v. Fried.

[167]Dickinson v. Riverside Iron Works, Inc., 372 N.E. 2d 1302 (1978).

interpretation of any word or phrase in a contract may be qualified by the context in which it appears. This includes the general purpose manifested by the entire contract and by the circumstance existing at the time the contract was executed.[168] When a provision with a well-established meaning is contained in a contract, that clause, rather than any supposed intentions of the parties gleaned from an analysis of the other provisions, determines the obligations of the parties.[169]

Generally, the law existing at the time an agreement is made enters into and becomes part of the agreement. Laws enacted after the execution of the agreement are not commonly considered to be a part of the agreement unless its provisions clearly establish that the parties intended to incorporate subsequent enactments into their agreement.[170]

When the words of a contract are clear, they alone determine the meaning of the contract. When the contract term is ambiguous, the meaning of the contract is ascertained from the intent of the parties as manifested by the contract's terms and the circumstances surrounding its creation.[171]

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[168]Dickenson v. Riverside Iron Works, Inc.

[169]Erhard v. F. W. Woolworth Co., 372 N.E. 2d 1277 (1978).

[170]Feakes v. Bozyczko, 369 N.E. 2d 978 (1977).

[171]Merrimack Valley National Bank v. Baird, 363 N.E. 2d 688 (1977).

Generally, a writing is construed against the author of the doubtful language if the circumstances surrounding its use and the ordinary meaning of the words do not indicate the intended meaning of the language. The author of the ambiguous terms is generally held to any reasonable interpretation which is attributed to the term which is relied upon by the other party.[172]

Rules of construction of a contract are designed to elucidate the intent of the parties to the written instrument.[173] Where the contracts are openly and fairly arrived at, the enforcement of them will not be denied because of hardship to one of the parties.[174]

Expressed and Implied Contracts

An expressed contract is a contract which results from the words expressed either orally or in writing by the parties.[175] It is an agreement between two or more competent parties for a consideration to do or not to do a lawful thing.[176] Common law has repeatedly held that an express

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[172]Merrimack Valley National Bank v. Baird.

[173]Emery v. Crowley, 359 N.E. 2d 1256 (1976).

[174]Lydon v. Allstate Ins. Co., 359 N.E. 2d 316 (1977).

[175]M.G.L. Ch. 259, sec. 1.

[176]Segal v. Allied Mutual Insurance Co., 285 Mass. 106 (1934).

contract results from the "meeting of the minds" of the parties, i.e., it must appear that the parties have agreed to do some specific thing.[177] However, it should be noted that a person who signs a written agreement, which he has not read, and, therefore, who is ignorant of the contents, may in the absence of mutual mistake or fraud, be held liable according to the terms of the writing. The acceptor of a negotiable bill of exchange may be held to pay the bill by the holder who negotiated the bill before it was accepted.[178]

Contracts which the law requires to be in writing are: (1) checks, (2) bills of exchange, (3) negotiable notes, (4) deeds, (5) bills of lading, (6) negotiable warehouse receipts and similar instruments.[179] Under M.G.L.A. ch. 259 sec. 5, the promise part of the will agreement is required to be in writing.

In an expressed contract, the mutual assent is demonstrated in words, oral or written. "Mutual assent" is commonly referred to as a "meeting of the minds" of the parties to the contract. In other words, the parties to the contract are both agreeing to the same thing at the same time.

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[177] Lydon v. Allstate Ins. Co.

[178] McNamara v. Boston Elevated Ry. Co., 83 N.E. 878 (1908).

[179] Arpin v. Owens, 3 N.E. 25 (1885).

By "meeting of the minds" of the parties to the contract, it is meant that usually one party has made an offer, sufficiently definite to be understandable and performable, intending contractual responsibility.[180] This offer, while still outstanding, has been accepted in all substantial particulars by the offeree within a proper time.[181]

Implied contracts arise from the conduct of the parties. There are two types of implied contracts: (1) implied in law and (2) implied in fact.[182] There are legal duties created or fixed by law which one person may owe to another for the violation of which the plaintiff's remedy is by an action of contract. These are the implied in law contracts, e.g., if a person supplies to a minor child necessaries, which the parent being able has refused or neglected to supply to the child, he may recover from the parent the fair value of the necessaries in an action of contract.[183] The reason here being that the law imposes the duty on the parent to pay for the necessaries, regardless of the parent's will or intention.[184] There are other

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[180] M.G.L. cc. 105, 106 and 108.

[181] Kelley v. Weiss, 102 N.E. 2d 93 (1951).

[182] National Shawmut Bank v. Fidelity Ins. Co., 61 N.E. 2d 18 (1945).

[183] Stinson v. Meegan, 67 N.E. 465 (1946).

[184] Broman et al. v. Byrne, 78 N.E. 2d 616 (1948).

certain circumstances under which, either to prevent the unjust enrichment of a person at the expense of another or as a matter of policy, the law implies a contract. Such instances in which a contract has been held to be implied in law are: (1) a situation in which there was a voluntary payment of money;[185] (2) where an agreed purchaser has been allowed to enter and occupy the premises pending the execution of a deed and the real property is destroyed without the fault of either party so that the contract is discharged;[186] (3) a situation in which the person waived the tort and sued in contract;[187] and (4) a situation in which there was liability for the value of property conveyed or services rendered under unenforceable contracts.[188] M.G.L. ch. 198, sec. 1 charges the expense of funeral and last sickness against the estate of the deceased person.[189]

"Implied in law" contracts are sometimes called quasi contracts. They are referred to as quasi contracts because there is no "mutual assent" but to avoid inequities and unjust enrichment, the law implies a promise to pay for the

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[185]Sciaraffa v. Debler, 23 N.E. 2d 111 (1939).

[186]Butterfield v. Byron, 27 N.E. 13 (1891).

[187]Welsch v. Palumbo, 73 N.E. 2d 844 (1947).

[188]Cromwell v. Norton, 79 N.E. 433 (1906).

[189]Counelis v. Counelis, 54 N.E. 2d 177 (1944).

benefits or services rendered even though no such promise was ever made.[190] "Implied in fact" contracts are real contracts. The promises of the parties are inferred from their acts or conduct alone, not in the spoken or written word. The "mutual assent" is based on conduct rather than words.[191] The plaintiff who seeks to be paid for a benefit conferred on the defendant under an "implied in fact" contract has the burden of proving that at the time of conferring the benefit he expected to be paid for it and that the defendant expected to pay, or, as a reasonable person, ought to have expected to pay.[192]

If a party supplied to another party labor and materials under a supposed express contract which does not exist because of mutual mistake, an action of contract may be maintained to recover the fair value of such labor and materials.[193] Cooper v. Cooper (17 N.E. 892) is a case where a woman went through a marriage ceremony which she thought was legal. She cohabitated with her spouse and performed the duties of her relation. On his death, she learned that he had a wife at the time of their marriage.

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[190] Butterfield v. Byron, 27 N.E. 667 (1891).

[191] Ibid., Restatement, sec. 5.

[192] Hobbs v. Massasoit Whip Co., 33 N.E. 495 (1893).

[193] Lonquist v. Lammi, 134 N.E. 255 (1922).

The court held that she could not recover the fair value of her services.

Offer and Acceptance

The primary requirement of a contract is that the parties to it show their mutual assent to the same bargain at the same time to each other. This manifestation is usually in the form of an offer and an acceptance.[194] An offer may be defined as a proposal by one party to the other thereby demonstrating an intention to enter into a valid contract, and creating a power in the offeree to create a contract between the parties by an appropriate acceptance.[195] There are three essential elements of a legally sufficient offer. They are: (1) manifestation of a present contractual intent; (2) certainty and definiteness in terms; and (3) communication of the offer to the offeree.[196] The person who makes the offer is known as the offeror. The person to whom the offer is made is termed the offeree.

The conduct or words used in the offer must be words of offer rather than mere words of preliminary negotiations,

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[194] Ibid., Restatement, sec. 22.

[195] Vickery v. Ritchie, 88 N.E. 835 (1909).

[196] Michael Chevrolet Inc. v. Institution For Savings, 72 N.E. 2d 514 (1947).

i.e., invitations to the second party to make an offer. The words themselves must evidence a present intent to contract.[197] The offer must be more than an advertisement or an offer to negotiate. It must be outstanding and unrevoked when the acceptance is attempted.[198]

If the offer does not state a time in which it can be accepted, it will remain open for a reasonable time.[199] What is a reasonable time is relative to the nature of the contract and the circumstances.[200] The surrounding circumstances may indicate that the words used did not manifest an intent to contract, e.g., extravagant proposals made in fun or in a state of emotion obvious to the recipient of the proposal do not manifest a contractual intent even if the words used would otherwise be sufficient words of an offer.[201] The more definite the proposal, the more likely it will be construed to be an offer. The terms of the offer must be sufficiently clear and complete so that the court may determine what the parties were intending and can fix

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[197] Kerwin v. Donaghy, 59 N.E. 2d 299 (1945).

[198] Kuzmeskus v. Pickup Motor Co., Inc., 115 N.E. 2d 461 (1953).

[199] Boston & M. R. Co. v. Bartlett, 3 Cush. 224 (1849).

[200] Loring v. City of Boston, 7 Metc. 409 (1843).

[201] Thurston v. Tornton, 1 Cush. 89 (1854).

damages in the event of a non-performance.[202] There are four essential terms to a valid offer: (1) parties to the contract; (2) subject matter; (3) time for performance; and (4) price. These essential terms must appear either in the express agreements of the parties or by reasonable implication.

An offer is enforceable even if it doesn't spell out all the essential terms, if it makes reference to some objective standard to fill in the missing terms.[203] This is said to be an offer capable of being made certain.

The offer must be communicated to the offeree. It is the communication of the offer which generates the power of acceptance in the offeree.[204]

The offer may be revoked at any time prior to acceptance. The revocation must be communicated to the offeree.[205] If the offer states a time in which the offer will remain open, it may still be revoked as long as the revocation is communicated to the offeree.[206] If the offer is under seal, it may not be revoked in violation of such an agreement.

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[202] Ibid., Restatement, sec. 32.

[203] U.C.C. sec. 1-203.

[204] Ibid., Restatement, sec. 23.

[205] Brauer v. Shaw, 46 N.E. 617 (1897).

[206] Sears v. Eastern R. Co., 14 Allen 433 (1867).

This is also true if, instead of a contract under seal, the offeror has agreed to keep the offer open for a consideration.[207]

Acceptance may be defined as a voluntary act on the part of the one to whom the offer is made, through the medium of which the offeree exercises the power to create a contract which was conferred upon him by the offeror.[208] An offer may be accepted only by the offeree (the person to whom the offer is made). Offers made to specified persons are personal to the offeree and may not be transferred to a third person.[209] An offer made to the public may be accepted by anyone. Two exceptions to the requirements for a valid acceptance are: (1) options, and (2) undisclosed principles. An offer is revocable until accepted, but a paid-for option is not.

A paid-for option is treated as a completed contract in which the offeror has bound himself not to revoke for a given period. If the offeree has given any consideration for the offer (normal value), it becomes an option. This option is a completed contract in which the offeror has

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[207] O'Brien v. Boland, 44 N.E. 602 (1896).

[208] Ibid., Restatement, sec. 52.

[209] Putnam v. Grace, 37 N.E. 166 (1894).

bound himself not to revoke the offer and this effectively destroys his right and power to do so.[210] Such a contract is not terminated by the death of the offeror. A gratuitous option (no consideration paid or recited) is treated as an ordinary offer, revocable by the offeror at any time, even though he expressly promises not to revoke.

A recital of consideration is not conclusive, however, the modern tendency is to construe the recital as a promise to pay the sum stated, e.g., "in consideration of $5.00 in hand paid, receipt of which is acknowledged."[211]

The acceptance must conform to the terms of the offer.[212] If the acceptance varies substantially from the terms of the offer, it will fail as an acceptance and serve as a rejection of the offer.[213] This attempted acceptance may serve as a new offer (counteroffer).[214] The offer once rejected cannot be revived by an attempted acceptance.[215] An acceptance will not be insufficient because it adds some addition to or modification in the offer, if it appears

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[210] Ibid., Restatement, sec. 47.

[211] Ibid., Restatement, sec. 89B(1).

[212] Putnam v. Grace.

[213] Moss v. Old Colony Trust Co., 140 N.E. 803 (1923).

[214] Champlin v. Jackson, 58 N.E. 2d 757 (1945).

[215] Peretz v. Watson, 324 N.E. 2d 908 (1975).

from the acceptance that the offeree intends unequivocally to accept the offer according to the terms of it, whether his suggestions are acceded to or not by the offeror.[216] McCullough v. Eagle Ins. Co. in 1822 held that when an offer was sent by mail, and an acceptance was mailed by the offeree, the contract was not formed until the acceptance was received by the offeror.[217]

Subsequently the issue of when an acceptance is effective arose in Brauer v. Shaw.[218] In this case, it was unnecessary for the court to decide on the facts, whether or not the acceptance took effect when sent. However, the court said it took the view of the Supreme Court in Taylor v. Merchants' Fire Ins. Co.[219] In this case, the court stated:

> The unqualified acceptance by one of the terms proposed by the other, transmitted by due course of mail, is regarded as closing the bargain acceptance.[220]

It is believed that this dictum has generally represented

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[216]Nelson v. Hamlin, 155 N.E. 18 (1927).

[217]McCullough v. Eagle Ins. Co., 1 Pick. 278 (1822).

[218]Brauer v. Shaw.

[219]Taylor v. Merchants' Fire Ins. Co., 13 L. Ed. 187 (1850).

[220]Taylor v. Merchants Fire Ins. Co.

the law of the Commonwealth.[221] However, the issue is not clear. In Lenox v. Murphy, the court said:

> There is no universal doctrine of the common law, as understood in this Commonwealth, that acceptance of an offer must be communicated in order to make a valid simple contract.[222]

Parties in some instances may agree on the essential terms of the contract but also agree that the binding contract shall await the subsequent formal written expression of their agreement. The language used by them and their inherent intent will determine whether they are instantly bound or whether they have post-enforceable rights and obligations until a formal contract is drawn up and executed by them.[223]

The doctrine of substantial performance applies only to bilateral contracts in which the parties have agreed to exchange performances without making either performance expressly conditional upon the other or in the occurrence of a particular event.[224]

The act of acceptance which is called for by the offer may be either an overt act on the part of the offeree, or the giving of a promise to perform. Historically, contracts

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[221] Bishop v. Eaton, 37 N.E. 665 (1894).

[222] Lenox v. Murphy, 50 N.E. 644 (1898).

[223] Louis M. Herman Co. Inc. v. Gallagher Electrical Co. Inc., 138 N.E. 2d 120 (1956).

[224] Creed v. Apog, 376 N.E. 2d 154 (1978).

have been defined as: (1) "unilateral" and (2) "bilateral." Restatement, Second, abolishes this categorization but most courts still utilize the terms. A unilateral contract may be defined as a contract in which the offer requires the performance of an act as the bargained-for consideration. Such an offer can usually be accepted only by doing the act. In an unilateral contract, once the offeree accepts, all the executory duties are on one side (the offeror's). After an acceptance, if there are executory duties on both sides, then the contract is what is termed a bilateral contract. A bilateral contract is where the offer calls for the giving of a promise as the bargained-for consideration. A bilateral contract gives immediate rights as well as complete protection to both parties, since a contract arises as soon as the offeree gives the counter promise. The offer for an unilateral contract does not mature into a contract until the requested act is completed. Until then, there is no binding contract to protect the parties' rights. A rejection by the offeree terminates the offer. The offeree's power of acceptance is at an end when he rejects the offer. If the offeree attempts to accept following his prior rejection, his "acceptance" is a mere counteroffer. A rejection must be communicated to the offeror. It is ordinarily only effective upon receipt by the offeror.[225]

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[225] Ibid., Restatement, sec. 39.

Consideration

Consideration may be defined as an agreed-for exchange which the law holds sufficient to support contractual rights and obligations. This agreed-for exchange may consist of an act, a promise to act or a mere forbearance to act. In the common law it has been held that consideration consists in a detriment to the promisor or a benefit to the promisee.[226] Recent case law has defined consideration in terms of a legal right . . . the giving up or agreement to give up a legal right.[227] Therefore, when issues of consideration arise, two essential elements must appear: (1) that something must have been bargained for between the parties; and (2) that something must have a legal value. It must appear that both parties were intending to enter into a contract. They both were willing to incur legal rights and liabilities.[228] There is no consideration if either party intended to confer a gift.[229] In doubtful cases, the courts tend to find a bargain intended, rather than a gift. The policy being to uphold the contractual expectancies wherever possible.

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[226] Torrey v. Adams, 149 N.E. 618 (1925).

[227] Wit v. Commercial Hotel Co., 149 N.E. 609 (1925).

[228] Peck v. Requa, 13 Gray 407 (1859).

[229] Ibid., Restatement, sec. 75.

Mere non-payment of the dollar agreed upon for consideration would not show conclusively that there was no consideration. It would be sufficient if it could be shown that the dollar was bargained for and that the parties intended that it would be paid in the future or there was some other valuable consideration transferred.[230]

Promises made out of a sense of moral responsibility or honor are not enforceable in the Commonwealth and in most states.[231] This is because the court reasons that the test of moral responsibility varies with the individual. Past consideration is not sufficient.[232] Gratuitous promises or those promises based entirely on moral or past consideration may be enforceable if the promisee has materially changed his position, in detrimental reliance on it. Within limits, detrimental action or forbearance by the promisee, in reliance on a promise, has been held to constitute a substitute for consideration and renders the promise enforceable. The promisee's detrimental reliance is held to be sufficient reason to estop the promisor from asserting the lack of consideration. The promisee's detrimental reliance also

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[230] Johnson v. Norton Housing Authority, 375 N.E. 2d 1209 (1978).

[231] Conant v. Evans, 88 N.E. 438 (1909).

[232] Mills v. Wyman, 3 Pick. 207 (1825).

operates as a substitute for "mutual assent" (in a gift promise, there is no offer and acceptance). This is known as the doctrine of promissory estoppel.[233]

A promisor will be estopped from denying the enforceability of his promise if the following elements are present: (1) the promisor made a promise which, though gratuitous, was the type of a promise which might forseeably induce the promisee to rely on it or to take some action on it; (2) the promisee did in fact rely on it, and his reliance was reasonable under the circumstances; (3) as a result of his reliance the promisee has suffered a substantial economic detriment and (4) injustice can be avoided only by enforcing the promise.[234] Consideration must be legally sufficient. Insufficient consideration is no consideration. Doing what one is already bound to the other party to do, or promising to do it, is not a valid consideration for a promise.[235] However, if that which is promised or done was required under the contract with a third person, there is consideration for the defendant's promise and the contract is valid and enforceable.[236] Cases of contingent consideration have

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[233] Ibid., Restatement, sec. 90.

[234] Ibid.

[235] Burgess Sulphite Fibre Co. v. Broomfield, 62 N.E. 367 (1902).

[236] Pool v. City of Boston, 5 Cush. 219 (1849).

been held to be sufficient consideration.[237]

If a party to a contract is no longer bound to fulfill it because of the default of the other party either a promise by the injured party to resume performance of the contract or the actual completion by that party is sufficient consideration to support a promise to pay made by a third party.[238]

Forbearance to sue (if one has a valid claim against another) is valid consideration for a promise by such other person.[239] In a situation where parties to a disputed claim have agreed to settle, their promises are consideration for each other and the compromise settlement is a valid consideration.[240] Mellen v. Whipple held that there must be privity of contract and that a stranger to the consideration could not recover on the contract though it was made for his benefit.[241]

Consideration need not be adequate.[242] It is enough that the consideration is valuable. Gross inadequacy may

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[237] Abbott v. Doane, 40 N.E. 197 (1895).

[238] Sheraton Service Corp. v. Kanavan, 357 N.E. 2d 20 (1976).

[239] O'Connor v. National Metals Co., 58 N.E. 2d 153 (1944)

[240] Barlow v. Ocean Ins. Co., 4 Metc. 270 (1842).

[241] Mellen v. Whipple, 1 Gray 317 (1854).

[242] Witherington v. Eldredge, 162 N.E. 300 (1928).

be evidence of fraud.[243] Inadequacy of consideration may be the reason for the failure of a bid for specific performance under the rule that such bills are addressed to the discretion of the court.[244] No consideration is necessary to make a sealed option agreement binding on the parties.[245]

Capacity

In order to have a valid contract, the parties to the contract must have capacity to contract. A contract, in other words, cannot be made by nor can it be enforced against, a person who does not have the capacity to contract.[246] Thus, certain persons are under a disability to make a valid contract. This disability may be total or it may be only partial.

Classifications: Contracts

Contracts may be classified according to the contractual capacity of the parties. Contracts, therefore, may be classified as: (1) valid and enforceable, (2) void, and (3) voidable. A void contract means a contract to which

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[243]Nickerson v. Bridges, 103 N.E. 939 (1914).

[244]Forman v. Gadouas, 142 N.E. 87 (1891).

[245]Johnson v. Norton Housing Authority.

[246]Ibid., Restatement, sec. 18.

there is a total absence of legal effect. A void contract imposes no liability on the parties thereto. A contract made by a person who has been judicially declared insane is no contract, just an event to the party. It is void. A "voidable contract" may be defined as a contract as to which one or more of the parties to it has the power either to (1) avoid the legal relation created by the contract by a manifestation of an election to do so or (2) extinguish the power of avoidance by ratification.[247] A "voidable contract" is valid and enforceable until and unless it is legally disaffirmed or the liability thereon is legally avoided, e.g., a contract made by an insane person, an infant or a drunk person is prima facie valid and enforceable. Disaffirmance and avoidance are matters of defense.

A party to a contract which is voidable, having avoided it, may still be liable in quasi contract for the reasonable value of the goods or services if the goods or services are necessaries. A "voidable contract" may not be set aside when it is inherently fair to both parties and it has been executed so far that the other party cannot be put back in a statu quo ante. A "voidable contract" may be ratified. A void contract cannot.

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[247] Ibid., sec. 13.

Thus, no one can be bound by a contract who does not have the legal capacity to incur at least voidable contractual duties. The capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction, or upon other circumstances.[248] A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties unless he is: (1) mentally ill or defective; (2) an infant; (3) under guardianship and (4) intoxicated.[249]

Insanity

A person who has judicially been declared insane or bereft of reason because of idiocy may not make a contract which will bind them or their property. They are under a total disability to contract. Thus, a person who has been declared insane cannot make a contract and a contract so made by such a party cannot be enforced against the party. The contract is voidable. The right to disaffirm the contract does not depend on knowledge or nature of the insanity by the other party to the contract.[250]

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[248]Ibid., Restatement, sec. 18.

[249]Ibid., Restatement, sec. 18.

[250]Sutcliffe v. Heatley, 122 N.E. 317 (1919).

Insane persons are liable for necessaries purchased by or furnished to them. This liability is based on an implied contract for the fair value of the necessaries, not on an express agreement to pay.[251] In Krasner v. Berk, the Supreme Judicial Court agreed in substance with the rule stated in Restatement Second, Contracts, s. 18c(1)(a). The court held:

> A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect . . . he is unable to understand in a reasonable manner the nature and consequence of the transaction.[252]
>
> Even where there is sufficient understanding a contract may in some circumstances be voidable by reason of failure of will or judgment, where a person contracting by reason of mental illness or defect, is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.[253]

A contract made by a person having legal capacity to contract is valid, even though such a person has a power to disaffirm or avoid the agreement. An insane person who has not been judicially declared to be insane may thus disaffirm or avoid the contract.

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[251] Belluci v. Foss, 138 N.E. 551 (1923).

[252] Krasner v. Berk, 319 N.E. 2d 897 (1974).

[253] Krasner v. Berk.

Minority

A minor's express contracts are voidable by him or his guardian subject to certain exceptions. The disability of a minor to contract is for the protection of the minor against improvidence. It is in the nature of a privilege personal to him or his guardian. This is true even as to an expressed contract for necessaries. The liability for the expressed contract for necessaries is on an implied contract for the fair value of the necessaries.[254] The researcher points out that an adult dealing with a minor may be held to his contract though the minor may disaffirm it.[255] Massachusetts General Law, Chapter 231, Section 85P provides:

> Except as otherwise specifically provided by law, any person domiciled in the Commonwealth who has reached the age of eighteen shall for all purposes, and any other person who has reached the age of 18 shall with respect to any transaction governed by the law of the Commonwealth, be deemed of full legal capacity unless legally incapacitated for some reason other than insufficient age.

A minor may not have specific performance of a contract to sell his real property against an adult purchaser.[256]

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[254]Drude v. Curtis, 67 N.E. 317 (1903).

[255]Dellamano v. Francis, 33 N.E. 2d (327).

[256]Freeman v. Fishman, 139 N.E. 846 (1923).

Among the exceptions to the rule of avoidance of his contract by a minor are:

(1) Statute provides that a minor over 15 years of age is bound by a contract, for life insurance or an endorsement plan, of which a husband, wife, children, mother, father, brother, or sister is the beneficiary.[257]

(2) An executory contract to form a partnership is voidable by a minor. However, if he becomes a partner, his right in firm assets is to share in the net balance after all firm obligations are paid. The minor may not disaffirm to the extent of depriving firm creditors of that part of firm capital contributed by the minor;[258]

(3) Statute provides a "female minor who has become eighteen may join with her guardian in making certain ante-nuptial contracts" and for this purpose "the guardian and the ward may convey her real and personal property to the trustees approved by the probate court," and "such conveyances shall have like effects as if said never were of full age";[259]

(4) By statute "the signature of a married woman who is a minor affixed by her to any instrument relating to the conveyance of land of her husband shall have the same effect as if she were of full age";[260]

(5) U.C.C. Article 2 provided that a minor may not disaffirm a sale of his goods as against an innocent purchaser for value from the minor's vendee;

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[257] M.G.L.A., Ch. 175, sec. 128.

[258] Pettelier v. Couture, 19 N.E. 400 (1889).

[259] M.G.L.A., Ch. 209, sec. 27.

[260] Ibid., Ch. 189, sec. 6 as amended by St. 1973 Ch. 925, sec. 65.

(6) By statute, any minor sixteen years of age or over, shall be deemed competent to contract for a motor vehicle liability policy or bond or for a policy of motor vehicle liability insurance to the same extent and to the same effect as though he had attained his full age;[261]

(7) By statute, "Residents of this Commonwealth who are veterans of World War II and are entitled to the benefits provided by the federal law known as the Servicemen's Readjustment Act of 1944, and also called the G.I. Bill of Rights, may participate in such benefits notwithstanding that they are under twenty-one years of age, and for said purpose such minors shall have full legal capacity to act in their own behalf in the matter of contracts, conveyances, mortgages and other transactions, and with respect to such acts done by them they shall have all of the rights, powers and privileges and be subject to the obligations of persons of full age."[262]

(8) A person who has attained the age of eighteen shall have full legal capacity to act in his own behalf in the matter of contracts and shall be liable in any civil action for breach thereof.[263]

A minor may disaffirm his contract while still a minor or after he becomes of age. The right of disaffirmance is personal to the minor or his guardian.[264] The right of disaffirmance is not conditioned upon a return or tender of

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[261] Ibid., Ch. 175, sec. 113K as amended by St. 1973, Ch. 925, sec. 59.

[262] St. 1945, Ch. 408.

[263] Ibid., M.G.L.A., Ch. 231, sec. 850. Added by St. 1973, Ch. 925, sec. 74.

[264] Chandler v. Simmons, 97 Mass. 508 (1867).

what the minor got under the contract. The party to the contract may recover back what property the minor did acquire and still holds under the contract.[265] If the minor sues to rescind a contract it is an unequivocal repudiation of the contract.[266]

A minor may ratify his contract when he becomes of age. Ratification has been defined as an act(s) or conduct of the minor which demonstrates an intention to be bound by the contract, e.g., treating property as his own, using it, selling it or otherwise dealing with it, constitutes sufficient evidence on which ratification may be found.[267]

Intoxication

Drunkenness and insanity involve degrees of mental aberration. If the mental derangement reached such a point that the person obviously does not understand the nature of what he is doing when making a contract, then he does not have capacity to contract and there is no contract.[268] If such a condition exists the person should be treated as though he has been judicially declared insane. A contract

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[265] Tracy v. Brown, 163 N.E. 885 (1928).

[266] Stanley v. Westwood Auto Inc., 322 N.E. 2d 768 (1975).

[267] Chamberlain v. Employer Liability Assur., Corp., 194 N.E. 310 (1935).

[268] Ibid., Restatement, sec. 18.

made by a person while he is so drunk as to be incapable of understanding its nature and effect is voidable by that person at his option.

Spendthrifts

Spendthrifts were capable of entering into valid contracts at the common law.[269] If a guardian has been appointed for a spendthrift or a person of advanced age who is incapable of managing his property, such persons are deprived of the capacity to contract except for necessaries. Their liability for necessaries stands on the same footing as that of minors and insane persons.[270]

Necessaries

The liability for necessaries is a question of fact, depending upon the condition in the life of the person, his habits, what people in like circumstances are accustomed to as well as upon the nature of the articles furnished. As a general rule, food, clothing, shelter, education and medical expenses have been held to be necessaries.[271]

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[269] O'Donnell v. Smith, 8 N.E. 350 (1886).

[270] M.G.L.A., Ch. 201, sec. 1 - 10.

[271] Moskew v. Marshall, 171 N.E. 477 (1930).

Married Women

At common law, a married woman could not make a contract. Today, a married woman may contract with her husband. She may make contracts (oral and written--sealed and unsealed) as if she were sole. A married woman may also sue in the contract made with her husband.[272]

Fraud, Mistake and Duress

Fraud

Fraud as used in the law of contracts means: (1) a misrepresentation known to be such; (2) a concealment; or (3) a non-disclosure where there is not a privilege to withhold the information.[273] Since a valid express contract results from the voluntary agreement of the parties, if there is fraud practiced by one party which induces the other party to contract, no valid contract results. Fraud may consist of fraudulent misrepresentation of fact which induces a person to make a contract, the nature of which he understands and which he intends to make. This is termed "fraud in the inducement" or "antecedent fraud." If the fraud consists of a fraudulent misrepresentation as to what

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[272] M.G.L.A., Ch. 209, sec. 2, 6, 882. as amended by St. 1963, Ch. 765.

[273] Ibid., Restatement, sec. 471.

the instrument is, i.e., that the instrument is something other than what it really is, it is called fraud in the essence of the contract or fraud in the nature or being of the contract.[274]

One kind of fraud is as fatal as the other to the validity of the contract induced by it. The exception to this rule is the cases in which the question is whether a defense of fraud is available in an action on a negotiable instrument brought by a holder in due course under the Uniform Commercial Code. Under the Uniform Commercial Code, fraud in the execution is a real defense but fraud in the inducement is not, e.g., when a literate person has had full opportunity to read a negotiable instrument and does not, he cannot successfully assert the defense of fraud in the execution against the holder in due course.[275] Therefore, if one party defrauds the other into executing the contract there is no real consent, and the contract is voidable by the innocent party.[276]

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[274] Bates v. Southgate, 31 N.E. 2d 551 (1941).

[275] Bruchett v. Allied Concord Fin. Corp., 396 P. 2d 186 (1964).

[276] Long v. Inhabitants of Athol, 82, N.E. 665 (1907).

When due to fraud, a contract or conveyance fails to express the agreement that the parties intended that it express, the defrauded party may seek a decree of reformation (equity). A decree of reformation is: (1) available only with respect to written instruments and contracts; (2) an alternative remedy to recission and (3) limited by the State of Frauds.[277]

Mistake

Mistake may be a defense to the formation of a contract. Mistake may be: (1) mutual or (2) unilateral.

Mutual Mistake. There is no contract, if both parties enter into an agreement based upon mutual mistake as to the existence or identity of the subject matter, or material or essential facts, or as to the nature of the contract itself.[278] If both parties are mistaken as to the terms of a contract because of ambiguous language innocently used, then no contract is formed because there has been no mutual assent.[279] However, one is bound by the language used if a mistake exists as to only one party.[280] Mutual mistake may be pleaded as a defense to an

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[277] Ibid., Restatement, sec. 491.

[278] Neel v. Lang, 127 N.E. 512 (1920).

[279] Vickery v. Ritchie, 202 Mass 247 (1909).

[280] Goldstein v. Darcy, 201 Mass 312 (1909).

action at law brought to enforce the contract or in an action in equity in which the legal remedy is not plain, complete and adequate.[281] If each party makes a different mistake as to the true facts, it does not detract from the fact that they were both mistakes.[282]

Unilateral Mistake. If one party is mistaken, and the other party is not chargeable with knowledge of the mistake, there is an enforceable contract. The mistake is no defense.

Duress

Duress consists of any act which overcomes the will of the other party and coerces the party to enter into the contract. Stevens v. Thissell in treating of duress held that "it is of no consequence how the domination over the mind was acquired; it is enough that it was acquired."[283] Duress of goods is sufficient grounds for avoiding the contract.[284] Neither party can compel the consent of the other for the purpose of contracting. Duress may be shown as a defense or grounds for recission.

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[281]Martin v. Jablinski, 149 N.E. 156 (1925).

[282]Ibid., Restatement, sec. 503.

[283]Stevens v. Thissell, 134 N.E. 398 (1922).

[284]Freeman v. Teeling, 194 N.E. 677 (1935).

This is also true in reference to contracts induced by threats of blackmail or extortion.[285]

Economic Duress. Economic duress may be a defense where A is in some way responsible for the bad economic situation in which B is placed. Economic duress has been held to be a valid defense to the enforcement of a contract where the following elements appear: (1) a wrongful or illegal act by one party; (2) placing the other party in a position in which his property or finances are seriously jeopardized or impaired; (3) no othe adequate means available to avoid or prevent the threatened loss other than entering into the contract; and (4) the duressed person was acting as a reasonable prudent person under the circumstances.[286]

Undue Influence. Undue influence as a defense has been limited by the courts to cases involving contracts between persons in fiduciary or confidential relationships (trustee-beneficiary, husband-wife) whereby one has taken unreasonable advantage of the other. Ordinarily two elements must appear: (1) promisor was vulnerable to the influence of the promisee and (2) the promisee used ex-

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[285] Ibid., Restatement, sec. 495.

[286] Ibid., Restatement, sec. 493.

cessive pressure in overcoming the will of the promissor.[287]

Illegality

A contract is illegal if its formation or performance is: (1) criminal, (2) tortious or (3) contrary to public policy. A contract may be illegal either because it has been made so by statute, or because it is against public policy as declared by the courts.[288] A contract based on illegal consideration is also illegal and not enforceable.[289] The reason that illegal contracts are not enforceable is not for the protection of the interests of the defendant who is often a party to the illegal agreement, but is that the law will not lend its aid to one who seeks to enforce alleged rights based upon his own illegal conduct.[290] Where the acts required by the contract are not morally wrong but are merely prohibited by law, either party may disaffirm the contract while it is still executory and may recover back any money paid or property delivered under the contract. Where a contract is partly legal and partly illegal and the ille-

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[287] Ibid., sec. 497.

[288] Ibid., sec. 512.

[289] Love v. Harvey, 114 Mass. 80 (1873).

[290] Slocum v. Metropolitan Life Ins. Co., 139 N.E. 816 (1923).

gal part has been disaffirmed by the Plaintiff, he may recover for labor and materials furnished under the legal part of the contract.[291] Where the facts regarding the illegality of the conduct of the contracting parties were substantially beyond dispute, the consequence was to be decided as a matter of law.[292]

If the legal contract has been executed, neither party may recover back money paid or property delivered under the illegal agreement.[293] A contract to commit a crime will not be enforced in Massachusetts even indirectly through an action in quantum meruit. Massachusetts has a strong public interest in ensuring that its rules governing marriage are not subverted. Then, even if, at the time of the contract, the parties to the contract did not mean the services to be rendered included illegal conduct, there can be no recovery if that performance was in fact illegal, and the illegality was serious and not merely an incidental part of the performance of the agreement.[294]

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[291]Eastern Expanded Metal Co. v. Webb Granite Co., 81 N.E. 251 (1907).

[292]Harness Tracks Sec., Inc. v. Baystate Raceway, Inc., 373 N.E. 2d 353 (1978).

[293]Buccella v. Schuster, 164 N.E. 2d 141 (1960).

[294]Green v. Richmond, 337 N.E. 2d 902 (1975).

There are a variety of common types of bargains which have been held to be illegal. They are (1) bargains in restraint of trade if the restraint is unreasonable;[295] (2) gambling or wagering bargains (merely because a contract, such as one for the purchase of securities or commodities on margin, is highly speculative, it does not make it a wagering contract);[296] (3) bargain under the terms of which one party gains a profit greater than that which is permitted by law is paid, or is agreed to be paid by, or on behalf of a debtor, for a loan of money, or for extending the maturity of a debt is usurious; usury is illegal. The illegality exists in either paying the interest or promising to do so;[297] (4) bargain tending to obstruct the administration of justice are illegal;[298] [to constitute a champertous act, it is not enough that an attorney is to look to the thing recovered for his compensation but there must appear the future element that the claim of the attorney for his services shall not constitute

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[295]Ibid., Restatement, sec. 513-19.

[296]Ibid., sec. 520-525

[297]Ibid., sec. 526-537.

[298]Ibid., sec. 540-558.

a debt owed to him by the client. If no debt is created and the attorney is to be compensated by a share in what is recovered, and he is to look to that alone for his compensation, the agreement is "champertous"];[299] (5) contracts which violate a public or private fiduciary duty are illegal, e.g., except statutory arbitrations, contracts to submit an entire dispute to arbitrators, without restrictions and indicating that the findings of the arbitrators shall be binding on the parties and final, is illegal as an agreement to oust the courts of jurisdiction;[300] (6) contracts in restraint of trade or restricting the individual to do business, earn a livelihood or enjoy the fruits of his incentive, industry and abilities;[301] (7) contracts to use influence or pressure upon the conduct of public officers or for fees procuring legislation when the party does not have a valid claim against the government;[302]

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[299]Gill v. Richmond Co-op Ass'n, 34 N.E. 2d 509 (1941).

[300]Sanford v. Boston Edison Co., 56 N.E. 2d (1944).

[301]United Shoe Marline So. v. Kimball, 79 N.E. 790 (1907).

[302]M.G.L.A. Ch. 3, sec. 39-50.

(8) bargain to pay a person to influence another person to let alone a will which the other person had made and not to execute a new will;[303] (9) bargain between a creditor and a debtor that the creditor shall receive more than other creditors--all creditors being party to the composition agreement;[304] (10) contracts to pay a witness compensation in excess of the legal fee for testifying in a case so that the party may prevail.

Party to a sham contract runs the risk that the court may accept the contract at its face value and decline to believe that it was intended by all parties as a sham.[305]

Sunday Contracts

The Lord's Day Act (M.G.L.A. ch. 136) provides that contracts made on Sunday are illegal. Contracts for necessaries or for charity are excepted. Contracts for activities which have been legalized by the granting of licenses are also excepted. In terms of a contract made on a Sunday in the Commonwealth: (1) if goods were sold on Sunday and delivered the same day, the seller may recover the goods back, since the buyer may not rely on an illegal contract

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[303] Pike v. Pike, 165 N.E. 5 (1929).

[304] Brown v. Nealley, 36 N.E. 464 (1894).

[305] Anderson v. K. G. Moore, Inc., 376 N.E. 2d 1238 (1978).

to sustain a claim of title;[306] (2) if goods are delivered on a day other than Sunday, the seller may recover the fair value of them on the theory of a contract implied in fact. He may not recover the contract price unless it is synonomous with the fair value.[307] (3) if a check or negotiable instrument was given on a Sunday in satisfaction of a debt, such an instrument would be illegal. If the creditor negotiated the instrument and received the cash, the receipt of the money constitutes a payment.[308]

Conclusion

As a general rule the law does not aid any party to an illegal contract. In the Commonwealth it is now generally settled that a defendant may not rely on the illegality of a contract sued on unless he has pleaded the illegality specially in his answer.[309] If the plaintiff's declaration shows that he relied upon an illegal contract, or where the evidence upon which he must rely shows a contract

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[306]Aldrich v. Inhabitants of Blackstone, 128 Mass. 148 (1879).

[307]Mayer v. Haycock, 18 N.E. 2d 348 (1938).

[308]Gorden v. Levine, 83 N.E. 861 (1908).

[309]Adamsky v. Mendes, 96 N.E. 2d 236 (1950).

which is inherently wrongful or against public policy objection to a recovery may be entertained, though the illegality is not specially pleaded.[310]

The Statute of Frauds

Oral contracts are valid in the majority of cases. The law does not generally require formality. By statute, a few types of contracts are required to be in writing or to be evidenced by a signed, written memorandum. The Statute of Frauds enumerates the contracts which, are not enforceable, if the issue is properly raised, unless the contract or a memorandum of it is produced to prove the contract. These statutory requirements stem from the English Statute of Frauds in 1677. The purpose of the Statute of Frauds is basically to prevent fraud and perjury. It also serves to provide evidence of the actual terms of the agreement.

M.G.L.A. ch. 259, sec. 1 provides that no action shall be brought: (1) to charge an executor or administrator upon a promise to answer damages out of his own estate for a debt of the deceased person; (2) upon an agreement upon a consideration of marriage; (3) upon an agreement

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[310]National Vinegar Co. v. Jaffe, 58 N.E. 342 (1900).

that is not to be performed with a year; (4) to charge a person upon a promise to answer for the debt, default or misdoing of another; and (5) upon a contract for the sale of lands, tenements or hereditaments or of any interests in or concerning them--unless the contract or a memorandum thereby is executed by the party to be charged thereto by his duly authorized agent.[311]

M.G.L.A. ch. 259, sec. 2 provides:

> Consideration need not be in writing--the consideration of such promise, contract or agreement need not be set forth or expressed in the writing signed by the party to be charged therewith, but may be proved by any legal evidence.

The consideration which by this statute may be proved by parol is the consideration of the promise sued on.[312]

Promises of Executors or Administrators

M.G.L.A. ch. 259, sec. 1(1), applies to a promise by an administrator to pay the amount of the distributive share of an heir, out of his own estate, to one who had purchased the share.[313] It does not apply to a promise by an executor to pay the plaintiff to forbear to contest the will under which the executor secured the undisputed title

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[311] Growers Outlet, Inc. v. Stone, 131 N.E. 2d 210 (1956).

[312] Bogigian v. Booklovers Library, 193 Mass. 444 (1907).

[313] Hay v. Green, 12 Cush. 282 (1853).

to real estate which was denied to him.[314]

Contracts Upon Consideration of Marriage

The statute applies to promises to make a payment of money, or a settlement of property, in consideration of marriage.[315] It refers to marriage settlement contracts and pre-nuptial contracts. It does not apply to mutual promises to marry between prospective spouses. The breach of a contract to marry was actionable at common law in Massachusetts. The "Heart Balm" law provides that: "Breach of the contract to marry shall not constitute an injury or wrong recognized by law, and no action, suit or proceeding shall be maintained therefor."[316]

Contracts Not to be Performed Within a Year

This refers only to contracts which, by their term, cannot by any possibility be performed within one year from the making thereof. The one year period begins from the date the contract is made, not when performance is promised. If the contract may be fully performed within a year it is not within the statute, though it is possible, and even probable, that full performance will not be had

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[314]Mackin v. Dwyer, 91 N.E. 893 (1910).

[315]White v. Bigelow, 28 N.E. 904 (1891).

[316]Ibid., M.G.L.A. ch. 207, sec. 47A.

within the year, i.e.:

1. Agreements without specific duration which in their nature are capable of performance within a year by the happening of an event, (employment contracts);[317]
2. Agreement to perform upon a condition which may happen within a year;[318] and
3. Agreement for alternative performance, one of which is capable of full performance within one year.[319]

Contracts to Answer for the Debt of Another

Promises to answer for of discharge the debts of another must be in writing to be enforceable. These are termed guarantee contracts. The contract to which the statute applies is to the guarantee promise made: (1) by one who is not presently liable for the debt, (2) to a creditor or obligee and (3) to discharge the present or future obligation of a third person. It is an idemnity contract.[320]

The primary purpose of the idemnity or guarantee

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[317]Roberts v. Rochbottom Co., 7. Met. 46 (1843).

[318]Carnig v. Carr, 167 Mass. 544 (1897).

[319]Worthy v. Jones, 11 Gray 168 (1858).

[320]Schultz v. Frary, 109 N.E. 2d 134 (1952).

contract is to secure to the promisee the performance of another's obligation to the promisee. The statute is said to apply only to "collateral" promises and not to "primary" promises. If the real contracting was between the promisor and the creditor, the promise is enforceable although oral.[321] If the promise is "collateral," when it appears that the promisor's main purpose in guaranteeing the obligation of another was to secure an advantage or pecuniary benefit for himself, his promise is enforceable even though it is not in writing.[322] This is an exception to the statute.

The statute does not apply--

(1) when the consideration for the promise is furnished to a third person at the promisor's request, and credit is given to the promisor. In this case, the debt is that of the promisor;[323]

(2) where the contract is to idemnify the promisee for an obligation assumed by him;[324]

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[321]Duca v. Lord, 117 N.E. 2d 145 (1954).

[322]Ibid., Restatement, sec. 184.

[323]Ribock v. Canner, 105 N.E. 462 (1914).

[324]Aldrich v. Ames, 9 Gray 76 (1857).

(3) where the promise is to reimburse the promisee for paying the promisor's debt;[325]

(4) where the promise is to pay a debt the promisor owes the promisee;[326]

(5) where the promisee releases or discharges the debtor, in consequence of the promise of the promisor to pay the promisee's debt;[327] and

(6) where the basic purpose of the promise to pay the debt of another is the promisor's acquisition of some title, lien, or interest to himself.[328]

Contract for the Sale of Land

A contract for the sale of land or any interest therein must be in writing. There is often difficulty in determining what is an "interest" in the sale of land within the mean of the statute. Liens, fixtures, growing timber, future interests have been held by case law to be within the meaning of the statute. The statute has been held to apply to: (1) an agreement of a mortgage at a foreclosure, that the mortgagee would hold the property and

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[325]Hill v. Grat, 141 N.E. 593 (1923).

[326]Hill v. Grat.

[327]Curran v. O'Donnell, 128 N.E. 408 (1920).

[328]MacDonald v. Stack, 189 N.E. 2d 21 (1963).

reconvey it to the mortgagor when the mortgagor paid the sum secured by the mortgage;[329] (2) an oral agreement by a mortgagee to relinquish his interest in the mortgage in favor of another;[330] (3) an oral agreement to give a mortgage or to enlarge one;[331] (4) an oral executory agreement to let real estate, or to give, take or assign a lease of realty;[332] (5) an oral agreement to create an easement.[333]

Within the Commonwealth, the statute has been held not to apply to: (1) a contract for board and room;[334] (2) an agreement by which plaintiff was to buy land for mutual benefit, take title in his own name, advance money for repairs and to sell the property and divide the profits equally with the defendant;[335] (3) a contract which creates a license to use land.[336]

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[329]Downing v. Brennan, 122 N.E. 729 (1919).

[330]Montuori v. Barlen, 194 N.E. 714 (1935).

[331]Lane v. Flint, 104 N.E. 570 (1914).

[332]Chase v. Aetna Rubber Co., 75 N.E. 2d 637 (1947).

[333]Estabrook v. Wilcox, 115 N.E. 233 (1917).

[334]White v. Maynard, 111 Mass. 250 (1872).

[335]Fencer v. Wills, 156 N.E. 841 (1927).

[336]Montuori v. Barlen.

The Memorandum

A memorandum of the essential terms of the contract--e.g., telegrams, letters, or notations (in one's private ledgers--books, never communicated to the other) is sufficient to satisfy the statute as long as it contains the essential terms of the oral contract.[337] The consideration of this type of a contract need not be set forth or expressed in the writing signed by the party to be charged but may be proved by a legal evidence.[338]

A memorandum of essential terms will be sufficient to satisfy the statute if it contains: (1) the identity of the contracting parties; (2) description of the subject matter of the contract; (3) terms and conditions of the agreement; (4) signature of the party sought to be charged.[339]

If it fails in anyone of these particular, the contract is unenforceable. The signature may appear anywhere in the memorandum, not necessarily at the end. The signature may consist of the person's seal, initials or even his mark. It may be affixed by an authorized intermediary or

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[337]Shayet v. Holland, 73 N.E. 2d 731 (1947).

[338]Ibid., Restatement, sec. 207.

[339]Ibid., Restatement.

an agent. Only the signature of the party sought to be held liable need appear. The fact that the party seeking to enforce it has not signed it is immaterial.

Where one of the parties to the contract is acting by an agent and the memorandum is signed by the agent as party without disclosing his principals, there is a sufficient designation of the parties, and the principal may sue or be sued upon the contract.[340] The doctrine of undisclosed principal applies to all contracts except those under seal and negotiable instruments.

One party to the contract cannot be the agent of the other party for the purpose of signing the memorandum to satisfy the Statute of Frauds. A third person may act as agent for both parties.[341] The memorandum may be made at the time of the agreement or at any subsequent time.[342]

The Statute of Frauds must be specially pleaded in the defendant's answer. Otherwise, it cannot be relied on as a defense.[343] When the Statute of Frauds has been

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[340]Tobin v. Larkin, 183 Mass. 389 (1903).

[341]Fessender v. Mussey, 11 Cush. 127 (1853).

[342]Sanborn v. Chamberlain, 101 Mass. 409 (1869).

[343]Middlesex Co. v. Osgood, 4 Gray 447 (1855).

pleaded, the burden of proving compliance with its terms rests upon the plaintiff.[344] The Statute of Frauds is a defense[345] which is personal to the maker of the contract and cannot be set up by a third person who is not a party to it.[346] The contract is not void but merely unenforceable. If the Statute of Frauds is not set up as a defense, the contract may be enforced. As against third persons such a contract is binding even though the statute is not satisfied.

Substituted Performance

A written contract and a contract under seal may be modified by a parol agreement made subsequent to the execution of the contract. The parol evidence rule has no application to such subsequent agreements.[347]

Where written contract concerning a subject matter within the Statute of Frauds has been subsequently modified by an oral agreement, the contract, partly oral and partly

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[344]Weiner v. Slovin, 270 Mass. 392 (1930).

[345]Weiner v. Slovin.

[346]Hoffman v. Charlestown Bank, 231 Mass. 324 (1918).

[347]Hastings v. Lovejoy, 2 N.E. 776 (1885).

written, is within the statute, and the writing is not a sufficient memorandum under the statute.[348] Where the subsequent agreement is not a modification of the original contract otherwise than as to the mode of performance, the case is not within the statute, and an action may be maintained, but it must be brought on the original contract in writing.[349]

New Promise by Insolvent Debtor

M.G.L.A. ch. 259, sec. 3 provides "no promise made by a debtor who has been discharged in bankruptcy, shall be evidence of a continuing contract so as to deprive the debtor of the defense of the discharge in bankruptcy, unless such promise is made by or is contained in a writing signed by the debtor or his authorized agent."

The statute only requires evidence of a continuing promise in some writing signed by the debtor. No precise form is necessary. The intention and the obligation of the debtor must be interpreted from the phraseology he chose to use. If the promise is sufficient, no consideration other than the discharged debt is necessary to bind the debtor.[350]

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[348] Ryan v. Gilbert, 71 N.E. 2d 219 (1947).

[349] Cummings v. Arnold, 3 Metc. 486 (1842).

[350] Howard v. Zilch, 190 N.E. 2d 77 (1963).

Performance and Breach

Performance

Once it has been determined that there is a valid contract in effect and the questions of third party rights and duties under the contract has been considered, the scope of each party's duty to perform is next to be determined.

Performance is the usual and normal way by which parties discharge their contractual obligations. There are nine methods of discharging contractual obligations, i.e., (1) agreement, (2) merger, (3) novation, (4) estoppel, (5) accord and satisfaction, (6) cancellation, intentional destruction or surrender, (7) release or covenant not to sue, (8) discharge by avoidance of voidable duties and occurrence of a condition subsequent.[351] A simple contract may be discharged orally or by a writing even though the original written contract is within the Statute of Frauds. If the discharge of a contract within the Statute of Frauds is by a substituted contract as opposed to an absolute discharge by recession a writing is required.[352]

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[351] Ibid., Restatement, sec. 385.

[352] Ibid., Restatement, sec. 406.

It is essential that each promise and provision of the contract be analyzed separately to determine whether it creates or conditions the duties or obligations of either party. Once the contractual provisions have been construed, the issue is whether the duties created under the contract have been performed. If not, whether there is some legal justification or excuse for their new performance.

Problems of performance of a contract are concerned with determining which party is in breach of the contract. In order to find a person in breach of a contract, it must appear that he was under an obligation (absolute duty) to perform, and that he failed to do so. The problem is to determine when a promisor's duty to perform has become absolute. This demands consideration of the type and legal effects of conditions in a contract. If the duty was only a conditional one, the promisor is bound to perform only after the condition occurs (condition precedent or concurrent), or only until it occurs (condition subsequent).[353] One who prevents the performance of a contract cannot take advantage of its non-performance.[354] In approaching the

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[353] Ibid., Restatement, sec. 257.

[354] Frank Fitzgerald, Inc. v. Pacella Brothers, Inc., 310 N.E. 2d 3 (1974).

problem of performance of a contract, the provisions of the contract must be examined to determine whether it is a condition or a covenant. It is possible that a given provision may be both a condition and a covenant.

Breach of contract is the violation of a contractural duty which one person owes to another.[355] It is the failure to perform for which a legal excuse is lacking.[356] "Breach of Contract" is confined to a wrongful doing. Non-performance of a contract is failure to perform the whole or a material part of a contract, whether or not the party failing to perform was, under the circumstances existing at the time, legally bound to render performance. Non-performance of a contract by a party to it may not constitute a breach of the contract by him, because under the circumstances, the party is not bound or has ceased to be bound to perform it.[357]

A party to a contract is not bound to perform it if he was led into it by fraud, mistake or duress of the other party, or where the contract is illegal or unlawful.

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[355] Andre v. Maguire, 26 N.E. 2d 347 (1940).

[356] Ibid., Restatement, sec. 312.

[357] Realty Developing Co. v. Wakefield Ready-Mixed Concrete Co., 100 N.E. 2d 2 (1951).

An insane person or a minor is not bound to perform his contract. He is entitled to disaffirm it.[358]

Excuse for Non-Performance. The general rule is that where a contract calls for the performance of an act not in itself unlawful, the party who is to perform is not released from his obligation by the fact that in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible. Unless provided against in the in the contract, unforeseen difficulties, no matter how great, will not excuse performance.[359]

Destruction of Subject Matter. Where there is a valid written agreement to convey real estate and there is no stipulation in such an agreement where the risk of the loss shall lie, a substantial destruction of the realty, without the fault of either party, between the time of the agreement and the time of performance will terminate the contract and neither party can enforce it. Under such circumstances since the parties to the contract did not provide for the emergency, there is an implied condition that the building shall continue in existance until the conveyance and the destruction of it without the fault of either party

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[358]Butler v. Prussian, 147 N.E. 892 (1925).

[359]Hawkes v. Kehoe, 193 Mass. 419 (1907).

will excuse performance of the contract, and leave no right of recovery in favor of either party against the other.[360] If, however, the destruction of the property is slight, that is, there is no substantial destruction, then the contract is not terminated and the vendor may compel the vendee to accept the conveyance or the vendee may compel the vendor to perform specific performance in equity or damage at law.[361]

In Massachusetts, if the realty is destroyed without the fault of either party between the time of the agreement to convey and the time of performance, the loss falls on the party who is the legal owner, i.e., the agreed vendor. The loss in other states falls on the agreed vendee for the reason that when there is a valid written agreement to convey real estate, the agreed vendor, between the time of the agreement and the time of performance, holds the property merely as a constructive trustee for the agreed vendee. The agreed vendee is therefore, the beneficial owner and should suffer the loss. Massachusetts recognizes the agreed vendor as holding the realty as constructive trustee for some purposes but holds

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[360]Allyn v. Allyn, 154 Mass. 570 (1891).

[361]Wells v. Callman, 107 Mass. 514 (1871).

that the losses resulting to the realty pending such agreement falls upon the party having the legal title, the agreed vendor.[362] Where the destruction of the realty is caused by the fault of one of the parties, the party at fault has no rights but the party not at fault may sue for damages at law or compel specific performance in equity.

Destruction of Subject Matter (Contractor Contract). Where a party agrees to do work on a certain chattel or building already in existence, there is an implied condition that the chattels or buildings shall continue in existence and a destruction of it without the fault of either party will excuse performance. Under such circumstances, if the party who was to do the work had not as yet done anything, the destruction of the subject matter terminates the contract and leaves no right of recovery of damages in favor of either party against the other.[363] If, however, the party who was to do the work has partly performed work and the chattel or building then is destroyed without the fault of either party, the party partly performing cannot recover on the contract but may recover in

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[362]Libman v. Levenson, 236 Mass. 221 (1920).

[363]Lord v. Wheeler, 1 Gray 282 (1854).

quasi-contract for work, labor and materials up to the time of its destruction.[364]

A person who agrees to build a house on the land of another is not discharged by the destruction of the house by fire before its completion; but where one agrees to repair another's house already built, such destruction of the house puts an end to the contract and the contractor may recover in quasi-contract for his work, labor and materials.[365]

Impossibility Caused by the Act of One of the Parties. Where a party agrees to work on certain chattel or building already in existence and it is destroyed through the fault of one of the parties, the party at fault is liable to the other for damages.[366]

Death or Disability. Where a contract depends on one's own personal services, the death or disability of such a person will excuse non-performance.[367]

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[364]Cleary v. Schier, 120 Mass. 210 (1876).

[365]Cleary v. Schier.

[366]Hawkes v. Kehoe.

[367]Cutler v. United Shoe Machinery Corp., 274 Mass. 34 (1931).

Impossibility Created by Law. If the non-performance of a contract is caused by an act of the law, this furnishes a valid excuse for non-performance.[368]

Covenant. A covenant may be defined as an absolute, unconditioned promise to perform. No conditions are attached to this contractural promise. A failure to perform a covenant is a breach of the contract per se.

Conditions. A condition may be defined as a fact or event, the happening or non-happening of which creates or extinguishes an absolute duty to perform on the part of the promisor. Failure of that which is merely a condition is not a breach of the contract. Conditions are important in bilateral contracts. The performance of the bargained for act in a unilateral contract leaves all the executory duties on the promisor (offeror). These duties are usually absolute because the offeror's promise of performance is generally a covenant. In a unilateral contract, after performance on the part of the offeree, it is possible that the offeror's duty to perform could be conditional.

The determination of whether a given contractual provision is a condition or a covenant (or both) may decide whether the promisor is in breach of contract. It will also fix the right and duties of the factors to the contract.

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[368]Hughes v. Wamsutta Mills, 11 Allen 201 (1865).

Whether a particular provision is a covenant or a condition is dependant on the intent of the parties. Generally, doubtful provisions will be construed as covenants, rather than conditions.[369]

Conditions create or extinguish the absolute duty to perform the contract depending on the time of their occurrence.

A condition precedent is a condition which must occur in order to create an absolute duty of performance. There is no enforceable duty owed until the fact or event happens. The burden of proof as to the occurrence of conditions precedent is always on the plaintiff.

Within the Commonwealth, contracts to be performed to the satisfaction of another may be divided into three classes: (1) where the questions of operation, fitness or mechanical fitness is involved;[370] (2) where the contract does not in any form of words require that the performance of the work to be done or the services to be rendered shall be to the personal satisfaction of the promisor,[371] and (3) where fancy taste, sensibility or

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[369]Ibid., Restatement, sec. 261.

[370]Weinstein v. Miller, 144 N.E. 287 (1924).

[371]Lockwood Mfg. Co. v. Mason Regulator Co., 66 N.E. 420 (1903).

opinion is involved.[372]

If the contract is subject to the personal satisfaction of the promisor, if the work was performed in a manner that would be satisfactory to a reasonable man in view of all the circumstances, the mere fact that the promisor was not satisfied is not conclusive against a right of recovery. There is read into the contract, the rule that, that which the law says a party ought to be satisfied with, the law will say he is satisfied with it.[373] If personal taste or other elements are not of the essence of the contract, if a promisor has agreed to perform to the personal satisfaction of the other party, he will be held to his agreement.[374]

Conditions concurrent are conditions which are mutually dependent performances capable of near simultaneous execution and which exist only when parties to the contract are bound to under performance at the same time.

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[372]Freid v. Singer, 136 N.E. 609 (1922).

[373]C. W. Hunt Co. v. Boston Elevated R. Co., 85 N.E. 446 (1949).

[374]Weinstein v. Miller.

The legal effects of a condition concurrent is that if the condition occurs, the other party's duty to perform becomes absolute. If it doesn't, the other party's duty never arises.

A condition subsequent is one in which the occurence of the condition subsequent cuts off and extinguishes the legal obligation of the promisor. The burden of allegation and proof of the happening of all the conditions subsequent is upon the defendant-promisor.

An expressed condition is a condition manifested or expressed in so many words by the parties. The parties can, subject to the limitations of the statute and public policy, make their obligations as dependent or independent as they choose and can spell out as many or as few conditions as they wish and they will be given effect by the courts.

Implied-in-fact conditions refers to the "necessary" conditions or "conditions of good faith and cooperation." These are the conditions that the parties would probably have agreed to had they thought about it. The law implies whatever conditions are inherent in the promise given and necessary to the performance of the contract.[375]

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[375]Ibid., Restatement, sec. 262.

The test for an implied-in fact condition is: would a reasonable man have felt that the parties were contracting with the understanding, though not expressly stated, that certain facts would exist? The existence of these facts will be an implied condition to the promisor's duty to perform.

The contract may have been entered into upon the implied understanding that, upon the happening of a certain contingency, the contract is to cease and both parties are relieved of their obligations under it.[376] If the contract is not upon an implied condition of the continued possibility of performance, the promisor is not relieved of the contract nor excused from performing it because it was originally or had subsequently become impossible to perform it.[377]

Implied-in law conditions--"constructive conditions"--are certain conditions which are not expressly provided by the parties. They are not of a type which the parties would have agreed upon. However, they may be

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[376]Goldstein v. Katz, 91 N.E. 2d 237 (1950).

[377]Conner v. Tewksbury, 63 N.E. 609 (1945).

implied by the courts in the interests of fairness and justice.[378]

The legal effect of occurrence or non-occurrence of a constructive condition is usually the same as an express or implied-in fact condition. It is subject to the possible exception of the doctrine of substantial performance, which is generally held to imply only to constructive conditions. There may be one or more conditions in a given contract.

Dependent and Independent Promises

Dependent promises operate the same way as do concurrent conditions. One has no right to performance on the part of the other until and unless he has offered or tendered performance.

Independent promises are those which must be performed by the promisor without getting any performance in return for it. The issue of whether specific words in a contract create a condition or a promise, and what is their effect in the contract, is a question of interpretation. Whether a particular breach is or is not material depends on the circumstances of the given case. If the contract deals with live subject matter, which fails to come into

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[378]Ibid., Restatement, sec. 253.

or which dies, or is seriously impaired before the date of performance, neither party is liable on the contract. This principle also applies to a party who agrees to perform personal services.

Aleatory Promise

An aleatory promise is a conditional promise based on the happening of a fortuitous event or an event considered by the parties to be fortuitous. A fortuitous event is one that is dependent on chance.[379] Wagering agreements fall within the scope of aleatory contracts and unenforceable because they are illegal. Insurance and suretyship contracts are aleatory. They are not illegal. Insuring and carrying others' risks are established businesses and such contracts are enforceable. Both promises may be conditional on the same fortuitous event. Although aleatory, the performances are regarded as the exchange for one another and are enforceable.[380]

Divisible Contracts

A contract is termed divisible where: (1) performance of each party is divided into two or more parts;

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[379] Ibid., Restatement, sec. 291.

[380] Ibid., sec. 292.

(2) the number of parts due from each party is the same, and (3) the performance of each part by one party is the agreed exchange for a corresponding part by the other party.[381] A contract for the delivery of goods in specific installments is a typical example of a divisible contract. This type of a contract generally sets forth the price to be paid for each installment when delivered.

Excuse of Conditions

Where either party's duty to perform is subject to a condition precedent or concurrent, that party cannot be held in "breach of contract" until the conditions occur or are legally excused. The party seeking to enforce the contract always has the burden of pleading and proving the occurrence, or excuse of each condition upon which the other party's duty was dependent.

If the condition was only a condition, and not a covenant, the failure of the condition is not a breach of contract. It prevents the duty to perform from arising. If the condition was a covenant then its non-performance constitutes a breach of contract per se. The following have been held to be an excuse for non-performance of a condition:

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[381]Ibid., Restatement, sec. 266.

(1) impossibility to perform personal service;[382]

(2) impossibility of performance caused by other party;[383]

(3) prevention or hindrance of performance by the other party in wrongful manner.[384]

(4) receipt of part performance as full performance;

(5) substituted contract;

(6) waiver of performance of conditions; and

(7) retaining benefits knowing of non-performance;

(8) destruction of subject matter.[385]

Breach

Definition-Introduction

A breach of contract is an unjustifiable failure to perform all or some part of a contractual duty; (2) repudiation or (3) one party's hindering or preventing performance by the other party. A breach of a contract may be total or partial. Failure of one party to perform

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[382]Culter v. United Shoe Machinery Corp., 274 Mass. 34 (1931).

[383]Wills v. Calnan, 107 Mass. 514 (1871).

[384]Hills v. Wamsutta Mills, 11 Allen 201 (1865).

[385]J. J. Newbury Co. v. Shannon, 268 Mass. 116 (1929).

at a time expressly or impliedly promised may constitute a substantial breach and thereby discharge the other party from his contractual duty. The party so discharged from the contract may be entitled to damages for total breach.

Anticipatory Breach. The general rule is that if one of the parties to a bilateral contract repudiates it before the day of performance, the other party may institute an action for breach of contract, without waiting for the time of performance to arrive. This is known as the doctrine of "anticipatory breach." This rule is followed in most states in the Union and in the Federal Courts. However, the doctrine of "anticipatory breach" is not recognized in Massachusetts, and no action on the executory (bilateral) contract can be maintained until the date specified for its performance has gone by.[386]

There are two exceptions to the Massachusetts rule on "Anticipatory breach":

(1) At common law in a contract to marry, there was an implied condition that in the time before the date set forth for the marriage, neither

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[386]Daniels v. Newton, 144 Mass. 530 (1974).

party should become engaged or married to another, there was a present breach of the implied condition and suit might be brought at once. Today, by statute breach of contract to marry does not constitute an injury or wrong recognized by law, and no action, suit or proceeding can be maintained therefore[387] and

(2) where a vendor has been deprived through the exercise of eminent domain of power to perform his contract the vendee need not wait until the time for performance arrives but the vendee may seek relief at once. The reason being that the taking by eminent domain placed the title entirely beyond the control of the vendor and it would be impossible for him to get it back at the date set forth for performance.[388]

Anticipatory Repudiation. Anticipatory repudiation of a contract may be defined as an announcement of an intention by a promisor that he will not render his future promised performance. It is restricted to executory bilateral contracts involving mutual and dependent conditions. It may be committed by: (1) a positive statement

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[387]Ibid., M.G.L.A., Ch. 207, sec. 47A., inserted by Acts 1938, Ch. 308, sec. 1.

[388]Gillis v. Bonelli-Adams Co., 284 Mass 176 (1933).

by the promisor to the promisee that he will not or cannot substantially perform the contract or (2) any voluntary act that makes it impossible or apparently impossible for the promisor to perform his contract.[389]

Anticipatory repudiation of a contract may be nullified by retraction of it and communication of same to the promisee before the promisee sues or changes his position in reliance on the repudiation.[390] The legal rights of the promisee after the promisor's anticipatory repudiation are:

(1) promisee may ignore the promisor's repudiation and urge him to perform;

(2) promisee may sue immediately to recover damages for the value of the promisor's performance;

(3) promisee may treat the repudiation as an excuse for not rendering his own promised performance and wait until the due date of the promisor's performance to sue and

(4) promisee may treat the promissor's repudiation as an offer of mutual recission and accept it in discharge of his contractural obligation--at the same time he may recover for his own performance in restitution.

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[389]Ibid., U.C.C., Ch. 2, sec. 610.

[390]Ibid., U.C.C., Ch. 2, sec. 611.

Under the Uniform Commercial Code, either party to a contract for the sale of goods has the right to demand "adequate assurances of performance" from the other party if reasonable grounds exist for believing the other party's performance may not be received (insolvency). Until such assurances are given the first party has the right to suspend any performance due by him. An unjustified failure to comply with the demand for such assurances for a period in excess of 30 days constitutes a repudiation of the contract as a matter of law.[391]

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may:

(1) for a commercially reasonable time await performance by the repudiating party; or

(2) resort to any remedy for breach even though he has notified the repudiating party that he would await the latter's performance and has urged retraction.[392]

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[391] Ibid., sec. 2-609.

[392] Ibid., U.C.C., sec. 2-610.

After repudiation with respect to a performance not yet due, the aggrieved party in a sales contract may immediately resort to any remedy he chooses, provided he moves in good faith.

Dependent and Independent Promises

Where the stipulations of the contract are dependent, the failure or refusal of one party to perform the acts so promised, without excuse, will relieve the other party from the obligations of the contract.[393] In the case of independent promises, the promisor has to perform his promise, and if he does not get what he pays for, his remedy is by a crossaction.[394] The general rule is that when performance under a contract is concurrent one party cannot put the other party in default unless he is ready, able and willing to perform and has demonstrated this by some offer of performance.[395] The law does not require a party to tender performance if the other party has shown that he cannot or will not perform. If the promises or terms of the contract to be performed by each party are independent of those to be performed by

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[393] Dale System, Inc. v. Wichroski, 69 N.E. 2d 241 (1903).

[394] International Textbook Co. v. Martin, 108 N.E. 469 (1915).

[395] Vander Realty Co., Inc. v. Gabriel, 134 N.E. 2d 901 (1956).

the other, the failure or refusal[396] of one party, without excuse to perform the promise to be performed by him, will not relieve the other party of the obligation to perform his agreement. His remedy is an action of contract against the party breaking the contract.[397]

Entire and Divisible Contracts

In an entire contract, a breach by one party as to a part performance will constitute a breach of the entire contract excusing performance by the other party and entitling him to an immediate right of action.[398]

If the contract is divisible, the breach of a part will not constitute a breach of the entire contract.[399] In this situation, the other party may have a right of action for the breach but not for breach of the entire contract. He will not be excused from further performance of his part of the contract.[400] In this situation, it may

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[396]Leigh v. Rule, 121 N.E. 2d 85 (1954).

[397]Boston Housing Authority v. Hemingway, 293 N.E. 2d 831 (1976).

[398]Barrie v. Quimby, 92 N.E. 451 (1910).

[399]Lander v. Samuel Heller Leather Co., Inc., 50 N.E. 2d 962 (1943).

[400]National Machine and Tool Co. v. Standard Shoe Machine Co., 63 N.E. 900 (1902).

appear that from the contract, a failure to perform as to a part was held to be of such importance as to go to the root of the contract so as to excuse the other party from full performance, he is still not excused.[401]

Exculpatory Clause

A general clause in a contract which purports to exonerate a person from all liability for breach may be invalid, because of repugnancy, or as depriving the agreement of mutuality of obligation. However, a stipulation to that effect, as to some particular term in an agreement, has been sustained.[402]

Commenced Contract

Where the contract is not executory but is a contract that has already commenced, an action for wrongful breach may be maintained at once for both past and future damages.[403]

Termination of Contract

A party to a contract is justified in treating a contract as broken and terminated: (1) where the other

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[401] Lander v. Samuel Heller Leather Co.

[402] Barrett v. Carney, 150 N.E. 2d 276 (1958).

[403] Dalton v. American Ammonia Co., 236 Mass. 105 (1920).

party's breach goes to the essence of the contract[404] or (2) where the other party's breach is willfull.[405] If the breach goes to the essence of the contract, it makes no difference whether or not it is willful.

If the breach is willful, it makes no difference whether or not it went to the essence of the contract. If the breach is not willful and does not go to the essence of the contract, the other party is not justified in treating the contract as broken and terminated.[406]

Substantial Performance (Building Contracts)

In Massachusetts, the rule is that in order for a party to recover on a building contract, there must be complete performance of it. The contractor who has failed to fully perform a contract to erect a building does not have a right of action upon the contract itself.[407] If, however, the contractor has attempted in good faith to perform and has fallen short of complete performance but has substantially performed, he may recover on an implied contract, in no case more than the contract price less damages (a count in quantum meriut).[408]

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[404] Johnson v. Walker, 115 Mass. 253 (1892).

[405] Homer v. Shaw, 171 Mass. 1 (1900).

[406] Douglas v. Lowell, 194 Mass. 268 (1907).

[407] Divito v. Uto, 253 Mass. 239 (1925).

[408] Bowen v. Kimball, 203 Mass. 364 (1909).

The contractor must act in good faith and substantially perform the contract. Lack of good faith even though there is a substantial performance will bar his right to recover even in implied contract.[409]

Substituted Agreement or Performance

Parties may agree subsequent to the making of the contract substituting new terms or a new contract or a new or different performance or the contract may have been waived by an agreement of the parties. In these situations, non-performance of the terms of the original contract would not constitute breach of it.[410] Ordinarily, a written contract, before breach, may be varied by a subsequent oral agreement, may enlarge the time of performance, or may vary any other term of the contract, or may discharge it altogether. This rule applies to both sealed instruments and simple contracts.[411]

An oral modification of a purchase and sale contract governed by the provision of M.G.L.A. Ch. 106, Article 2, is valid and binding regardless of whether it is supported by consideration.[412]

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[409] Hayward v. Leonard, 7 Pick. 180 (1828).

[410] Dean v. Skiff, 128 Mass. 174 (1880).

[411] Costonis v. Medford Housing Authority 176 N.E. 2d 25 (1961).

[412] Skinner v. Toben Foreign Motors, Inc., 187, N.E. 2d 669 (1963).

Excuse for Non-Performance

A party to a contract, in some circumstances, is not bound to perform it because the other party has broken the contract.[413]

Accord and Satisfaction

When the contract has been broken by one of the parties and there is an effort to settle their differences, the parties enter into a new and valid agreement in which the party in default is to do some other act in lieu of performance of the contract. This new agreement, though still executory is an accord. When the agreement is performed there is an accord and satisfaction.[414]

An accord followed by a satisfaction may be pleaded in discharge in an action on the original contract, and if proven, will bar such an action.[415] An unexpected accord will not operate to discharge liability in an action on the original contract, if it appears that the parties intended that the new agreement shall have that effect--the accord will discharge the liability.[416]

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[413]Dale System v. Wichroski, 69 N.E. 2d 241 (1903).

[414]Coragulain v. Rudd, 184 N.E. 717 (1933).

[415]Marr v. Heggie, 58 N.E. 2d 1 (1944).

[416]Sherman v. Sidman, 14 N.E. 2d 145 (1938).

Remedies

There are three basic remedies for breach of contract, namely: (1) damages; (2) restitution and (3) specific performance. Damages has been held to mean a sum of money, awarded as a compensation for injury caused by a breach of contract. It is a remedy aimed at placing the injured party in as good a position financially as he would have been if the other party had performed the contract. Restitution means recovery of a specific thing, which has been delivered in performance, or recovery of the value, in money, or a performance rendered by one party and received by another. The purpose of this remedy is to restore the injured party to the postion he occupied before he entered into the contract. The measure of recovery is the reasonable value of the plaintiff's performance.[417] Restitution is available only when there has been a total breach by the defaulting party. If there is only a partial breach, the remedy is in damages.[418] Specific performance may be defined as the rendering as nearly as is practicable of a promised performance. This is a discretionary remedy available only where the remedy of damages would be inadequate.[419]

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[417] Ibid., Restatement, 327-346.

[418] Ibid., sec. 347-357.

[419] Ibid.

In addition to the requirement of inadequacy of damages, the following limitations also exist so that specific performance will be refused is: (1) the terms of the agreement are unfair, if the agreement was induced by some sharp practice, misrepresentation or mistake or if enforcement will cause unreasonable or disproportionate hardship or loss; (2) the performance is impossible, tortious, criminal, or a violation of the rights of third parties which are superior to the rights of the plaintiff; (3) the performance sought in personal service; (4) the court cannot supervise the performance; and (5) the plaintiff himself is guilty of a material breach.[420] If the plaintiff, in a mistaken but good faith effort, pursues a remedy which is not available, it is not a bar to a suit for a different remedy. Damages and restitution are alternative remedies.[421] Only one of them will be given as a remedy for any given breach of contract.[422]

Damages

The aggrieved party is entitled to sue for damages for breach of contract. Plaintiff is entitled to be placed in as good a position as he would have occupied if the

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[420] Ibid., Restatement, sec. 367-379.

[421] Ibid., sec. 383.

[422] Ibid., sec. 384.

defendant had fulfilled his contractual obligation. This result is achieved by an award of compensatory damages.[423] A plaintiff, in an action for damages for breach of contract, cannot recover damages which after notice of breach, he could have avoided.[424] The general rule regarding the quantum of damages is:

> Upon any breach of contract, whether of warranty or otherwise, the defendant is liable for whatever damages follow as a natural consequence and the proximate result of his conduct, of which may be reasonably supposed to have been within the contemplation of the parties at the time the contract was made as a probable result of a breach of it.[425]

Liquidated damages, when provided for in a contract for its breach, may be recovered if the amount is reasonable and bears a reasonable relationship to the actual damages caused by the breach. If the plaintiff has not suffered a pecuniary loss or his injury is too speculative, nominal damges are recoverable for invasion of the plaintiff's legally protected interests. Punitive or exemplary damages are generally not recoverable in a breach of contract action.

Damages for breach of contract are limited to those which the defendant could reasonably foresee at the time

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[423] Ibid., sec. 329.

[424] Ibid., sec. 336.

[425] Leavitt v. Fiberloid Co., 82 N/E. 682 (1907).

of the making of the contract as the probable result of such a breach. Unusual or consequential damages can be recovered only when the defendant has been made aware of the probable occurrence of them. In the absence of a specific contract provision to the contrary, a party to the contract may recover damages caused by delay in the commencement of completion of performance, if it can be shown that the delay was a breach of the contract.[426]

Assignment

An assignment of what is due, or is to become due, under a contract, is not an assignment of both the duty of performing the contract and receiving payment for it--is the law in this Commonwealth. If the contract as a whole is assigned, there is no separation between the benefits and the burdens.[427]

Summary

Faculty and administrative personnel in public higher education do not have the legal authority to enter into a contract on behalf of their respective institutions unless delegated the right by the statutory authority.

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[426]St. Germain and Son, Inc. v. Taunton Redevelopment Authority, 340 N.E. 2d 916 (1974).

[427]Chatham Pharmaceuticals, Inc. v. Angier Chemical Co., Inc., 196 N.E. 2d 852 (1974).

Basic concepts of the law of contract were identified and synthesized in pages 252-332. This study presents basic concepts from the law of contract relevant to faculty and administrative personnel in public higher education using the technique of school law research. This content is a reference for faculty and administrative personnel in public higher education for use in negotiating contracts and the substance for the content in the cognitive domain of needed quasi-legal training in the education program.

An analysis of case law in the 1966-1977 period which relates to higher education and the law of contract may be categorized into three areas: (1) student, (2) faculty, and (3) institutional. These cases included decisions from both state and federal courts. Litigation is voluminous. For the purpose of this research one hundred cases were briefed and presented herewith. The legal reasoning and basic legal concepts set forth in the three nineteenth centruy cases are commensurate with those of the present court's decisions in the seventy-eighth year of the twentieth century.

In selecting the one hundred cases for briefing, preference was given to the most recent decisions, as well as those which relate to issues in higher education in the

Commonwealth. This additional research was undertaken to identify the major areas of the law of contract which were in issue and to determine the most frequently litigated areas of contract law, thereby identifying primary domains of needed quasi-legal training for the education profession.

Appendix II lists the case citations according to the major law of contract area in issue in each case. Many cases have multiple issues, which necessarily include one or more of the other areas of the law of contract, but for the purpose of this inquiry only the major issue was classified. Table 4, page 335, shows a comparison of the analysis of 100 cases in higher education by related constituents to the area of the law of contract which is in issue.

Figure 4, page 336, shows a comparison of the percentage of issues in relation to the Area of Expressed or Implied Contract between student, faculty and institution related constituencies in the 100 cases in higher education. This figure demonstrates that in this area, there were twenty-two percent of the student issues, nine percent of the faculty issues and twenty-eight percent of the institutional issues while Figure 5, page 337, shows that in the area of Offer and Acceptance, there were twenty-eight percent of the student issues, twelve percent of the faculty

TABLE 4

ANALYSIS OF 100 CASES BY RELATED CONSTITUENTS ACCORDING TO THE AREA OF THE LAW OF CONTRACT IN ISSUE

Higher Education Selected Cases / Related Area	Law of Contract							
	Expressed or Implied	Offer and Accept	Consideration	Capacity	Fraud, Mistake, Duress	Illegality	Statute of Frauds	Performance and Breach
Student	5	6	0	1	0	1	0	9
Faculty	5	8	0	0	3	0	0	44
Institution	5	3	1	2	0	2	0	5

Source: 100 Cases.

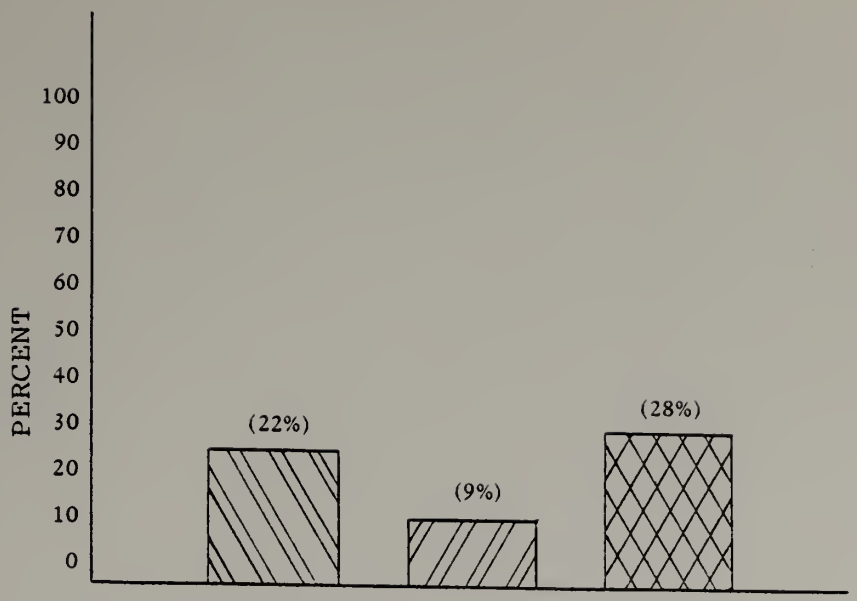

Figure 4. Comparison of the percentage of issues in relation to the area of Expressed or Implied Contract between student, faculty and institution related constituencies in the 100 cases.

Legend: Student

Faculty

Institution

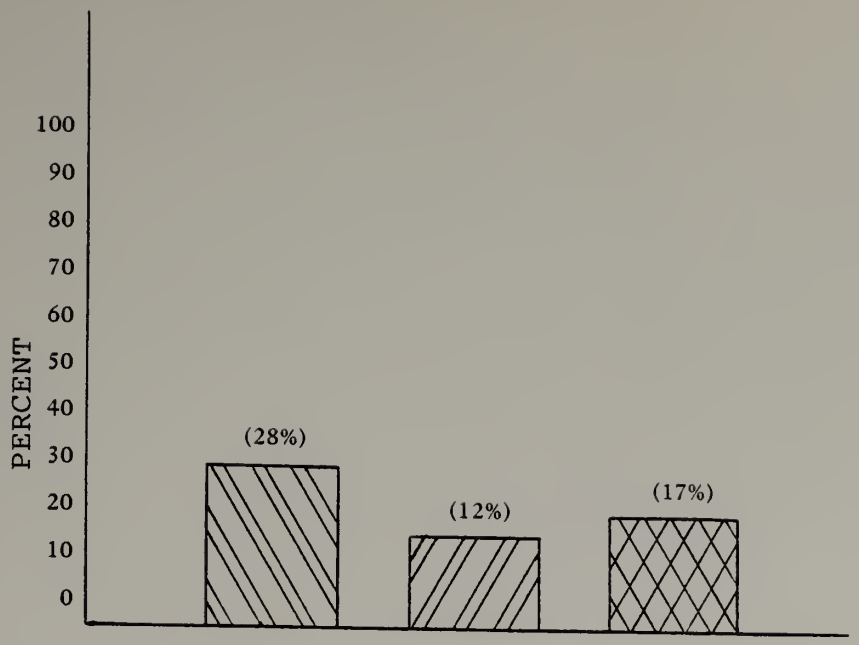

Figure 5. Comparison of the percentage of issues in relation to the Area of Offer and Acceptance in the law of contract between student, faculty, and institution related constituencies in the 100 cases.

Legend: Student

Faculty

Institutions

issues, and seventeen percent of the institutional issues.

In the area of Consideration, there were no issues involved in the student and faculty areas, while five percent of the institutional issues were in this area (Re; Figure 6, page 339).

Issues as to the Capacity of the parties to contract arose in five percent of the student issues, zero percent of the faculty issues and eleven percent of the institutional issues (Re: Figure 7, page 340).

Figure 8, page 341, indicates that zero percent of the student issues, five percent of the faculty issues and zero percent of the institutional issues were in relation to the area of Fraud, Mistake and Duress while Figure 9, page 342, demonstrates that five percent of the student issues, zero percent of the faculty issues and eleven percent of the institutional issues relate to the area of illegality.

The Statute of Frauds was not an issue in any area as shown by Figure 10, page 343 .

Figure 11, page 344, in comparing the percentage of issues in relation to the area of Performance and Breach of Contract identifies that forty percent of the student related issues were in this area while the faculty had

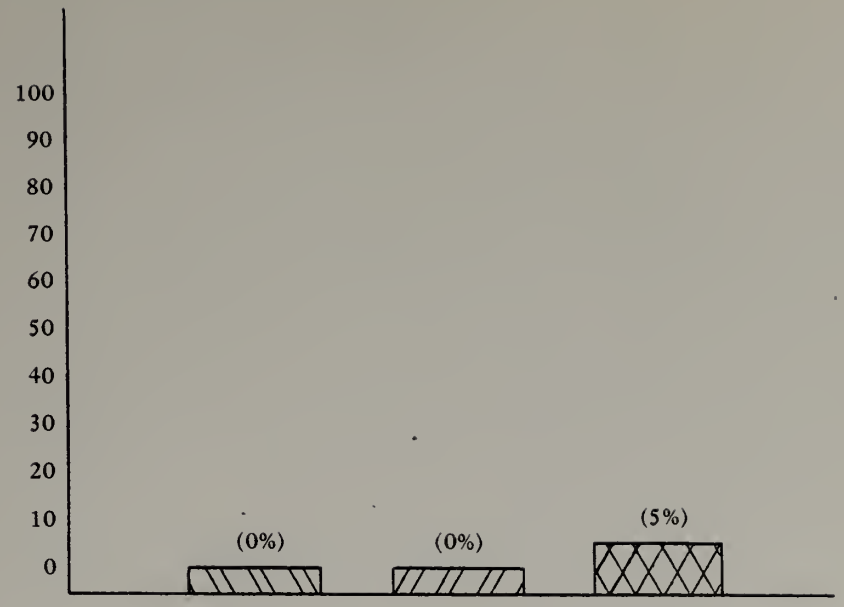

Figure 6. Comparison of the percentage of issues in relation to the area of Consideration in the law of contract between student, faculty, and institution related constituencies in the 100 cases.

Legend: Student

Faculty

Institution

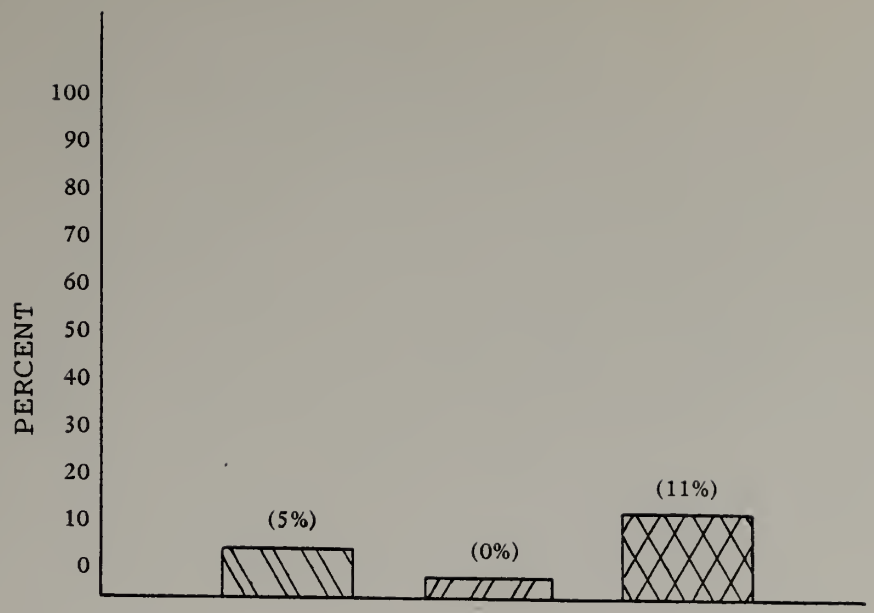

Figure 7. Comparison of the percentage of issues in relation to the area of capacity in the law of contract between student, faculty and institution related constituencies in the 100 cases.

Legend: Student

Faculty

Institution

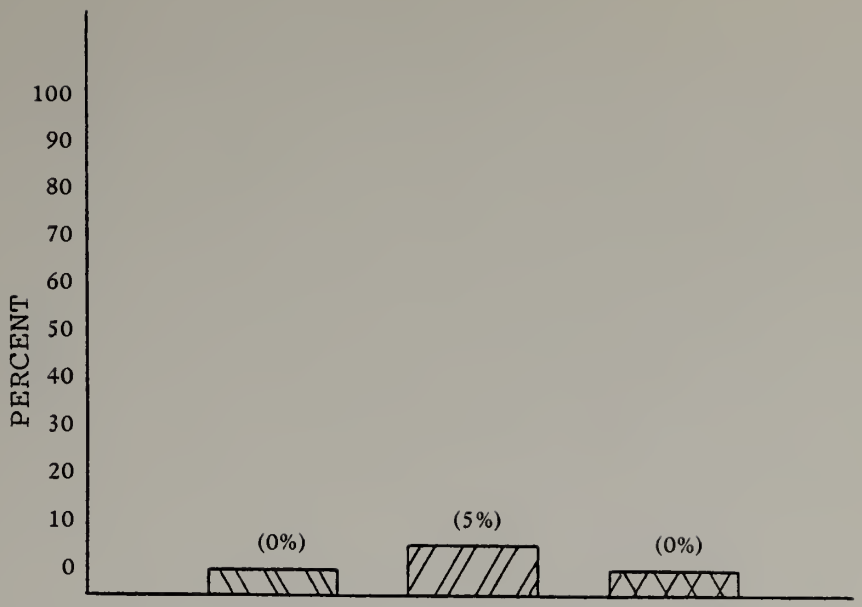

Figure 8. Comparison of the percentage of issues in relation to the area of Fraud, Mistake and Duress in the law of contract between student, faculty and institution related constituencies in the 100 cases.

Legend: Student

Faculty

Institution

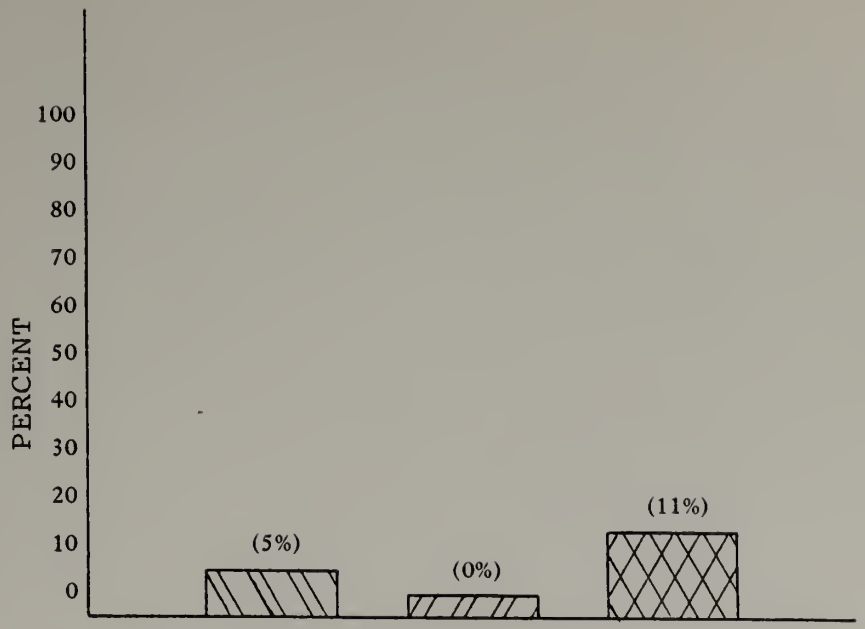

Figure 9. Comparison of the percentage of issues in relation to the area of Illegality in the law of contract between student, faculty and institution related constituencies in the 100 cases.

Legend: Student

Faculty

Institution

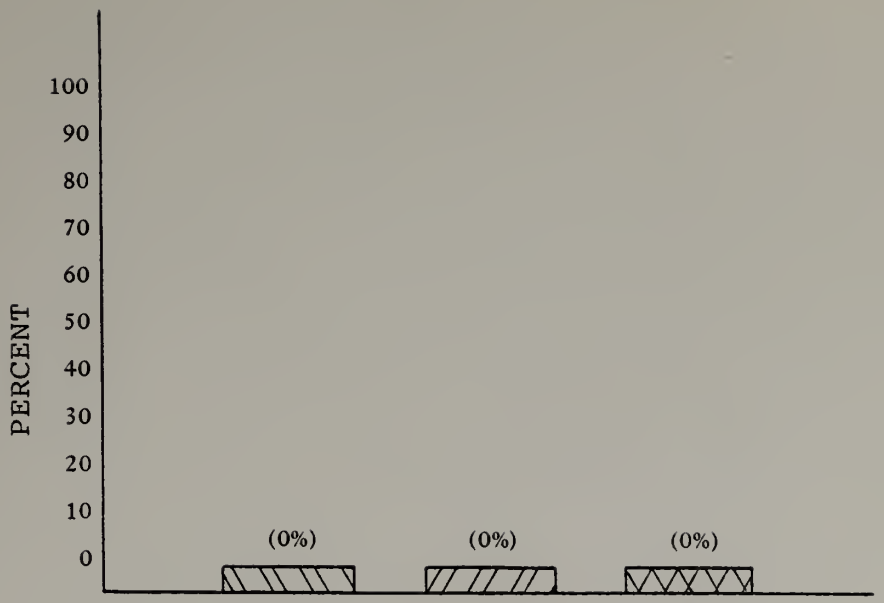

Figure 10. Comparison of the percentage of issues in relation to the area of the Statute of Fraud between student, faculty and institution related constituencies in the 100 cases.

Legend: Student

Faculty

Institution

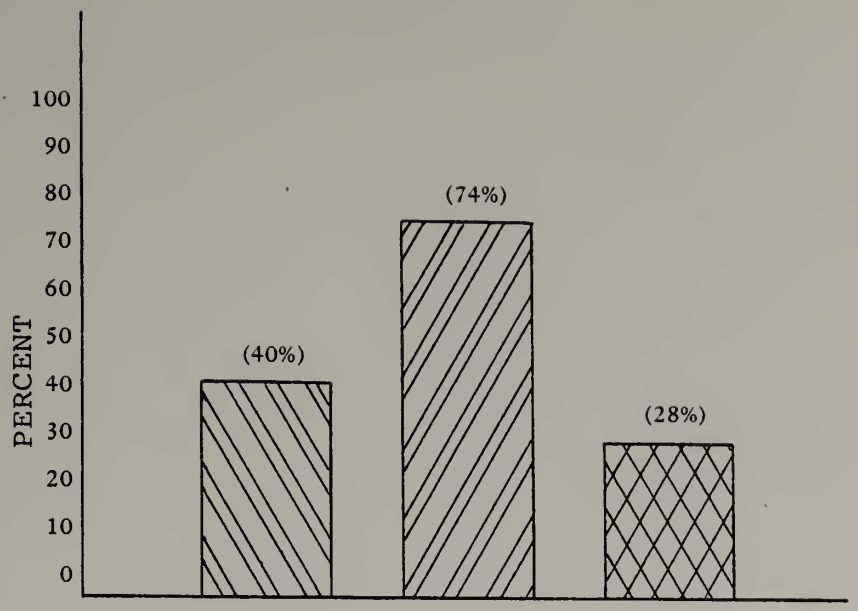

Figure 11. Comparison of the percentage of issues in relation to the area of Performance and Breach in the law of contract between student, faculty and institution related constituencies in the 100 cases.

Legend: Student

Faculty

Institution

seventy-four percent and institutions twenty-eight percent. Figure 12, page 346, shows a comparison of the distribution of the percentages of student, faculty and institutional issues, in the 100 cases in higher education to the areas of the law of contract.

A reinforcement to the analysis of the case law is the survey of the literature in higher education, which shows that in studying the college's response to student litigations, college administrators and attorneys have been unprepared to answer issues raised by students. The organizational behavior of the institutions of public higher education became that of crisis management with minimum knowledge of legal parameters.

As the promotion of health through health education may in essence prevent disease, the investigator conducted this research in order to provide the informational base which could serve to promote the health of our educational institutions and consequently prevent the incidence of so much litigation in public higher education, i.e., the "instances of erroneous and unwise misuses of power by those invested with powers of management and teaching in the academic community, as in the case of all human fallible institutions."[428]

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[428]United States District Court for the Western District of Missouri, 45 R.R.D. 133.

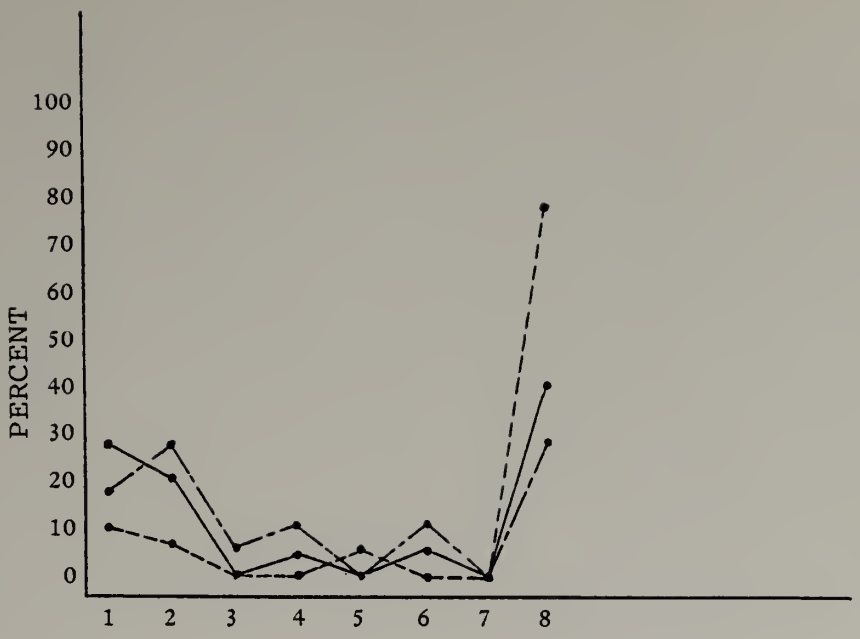

Figure 12. Comparison of the distribution of the percentages of student, faculty and institutional issues in the 100 cases to the area of the law of contract.

Legend: Areas of the Law of Contract According to Issue.

1. Expressed or Implied
2. Offer and Acceptance
3. Consideration
4. Capacity
5. Fraud, Mistake, Duress
6. Illegality
7. Statute of Frauds
8. Performance and Breach

Student ————

Faculty - - - - - - -

Institution —·——·—

We are indeed in a period of time in the Commonwealth in which educators must be knowledgeable about basic concepts of the law in order to formulate sound educational decisions, which not only respect the dignity of the human person, but protects and inculcates his legal rights. Prophylaxis negates the inconveniences and stigma of the litigation process.

C H A P T E R V

SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

Restatement of the Problem

The premise or implicit hypothesis of this study is that faculty and administrative personnel in public higher education need to know basic concepts of the law, but the majority of them have not had formal educational preparation in the field of the law. Thus, a marked dichotomy exists between what is and what should be. This is the problem that this research has addressed.

Current trends in the Commonwealth bring into sharp relief the need for faculty and administrative personnel to possess a working knowledge of the law of contract. The evolution of institutions of higher education into massive business enterprises, while at the same time retaining the practice of selecting administrators from the academic ranks, has exacerbated the problem. The alternative mode--recruiting as institutional managers individuals trained for management--is not for one reason or another in widespread use. In view of prevailing conditions, which are characterized by the juxtaposition of accountable managers without legal training and an upsurge of dependence on court ruling as the measure of accountability, the task

of equipping administrators with a basic understanding of law is inescapable.

The observation of this need is the essence of the implicit hypothesis of this study. Yet, since the proposition is judgmental, it could not be validated by conventional means. The only recourse was to determine whether or not the literature contained authoritative corroboration of the researcher's thesis, which indeed it did.

Having dismissed the most obvious recourse to legal training--enrolling in law school--as impracticable, the researcher searched the literature for clues to what the substance of a quasi-legal education for administrators should be. The preponderance of contract litigation in higher education suggested that the bare bones of quasi-legal education lay in this domain. The substantive portion of this study is an analysis of 100 cases drawn from the voluminous contract litigation in higher education. The purpose was to inform the selection of content for the quasi-legal education of faculty and administrative personnel in higher education.

Summary of Findings

The source of data for the purpose of this research was the "conscious testimony" or the primary source of the law. This historical research applied the scientific

method to the description and analysis of past court litigated issues in actions in contract. Thus, the data were drawn from the observations and experiences of others. The investigator used logical inferences to supplement this type of research. The case analysis is compatible with the consequences of the implicit hypothesis and the implicit hypothesis is confirmed. Major findings of the study are:

1. Contract litigation in higher education and the law of contract goes back to the early nineteenth century (1819).

Discussion. Three nineteenth century cases, namely (1) Middlebury College v. Chandler,[429] (2) People v. New York Law School,[430] and (3) Sterling v. University of Michigan,[431] bear out that various issues relative to the law of contract and higher education have been litigated since the nineteenth century in the United States.

In Sterling v. University of Michigan, the court dealt with an issue relevant today: Did the legislature have the constitutional right to interfere with or dictate the management of the University? This case indicates that issues

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[429] Middlebury College v. Chandler, 16 Vermont 683 (1844)

[430] People v. New York Law School, 22 N.Y.S. 663 (1893)

[431] Sterling v. University of Michigan, 68 N.W. 253 (1896)

relative to the fiscal autonomy are not new. It refers to the State College in Massachusetts, which had been a failure under management by the state, and cited the need for an organizational structure in public higher education which would utilize a board of regents to control the management system.[432]

Middlebury College v. Chandler held that a college education was not a "necessary" under the law. Therefore, a minor student was not responsible for his tuition bills under the theory of an implied contract.[433] Table 1, page 95, indicates that twenty-three percent of the issue emanences in the student-litigated cases were in the area of "Expressed or Implied" contracts. It would seem that students are still raising issues of implied contract.

The academic freedom of faculty, which in 1978 is under attack in the current focus on the "tenure system," was litigated back in 1893. In People v. New York Law School, the court determined that it was within the academic prerogative of the faculty to make academic decisions, e.g., recommend candidates for a degree.[434]

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[432]Sterling v. University of Michigan.

[433]Middlebury College v. Chandler, 16 Vermont 683 (1844).

[434]People v. New York Law School, 22 N.Y.S. 663 (1893).

2. There are some recurrent issues within the law of contract that have deep historical roots.

Discussion. Chapter II shows the historical development of the Law of Contract in the United States. It verifies the sequential theory of the layering of case law and contributes to a longitudinal perspective of the development of the law of contract over two centuries.

The definition of a contract, as in the Dartmouth College Case (1819), still controls in the Commonwealth in 1978. Case law presently, as well as over the years, consistently upholds the separation of the academic decisions and the courts, when the faculty are not arbitrary or capricious in their judgment (People v. New York Law School).[435]

3. Sixty percent of contract litigation according to this sample, emanate from faculty. The other forty percent are almost evenly divided between students (twenty-two percent) and institution-initiated (eighteen percent) actions.

Discussion. The analysis of the 100 cases in higher education showed that sixty percent of the cases were faculty related (Figure 13, page 353). This sixty-to-forty ratio may reflect the advent of collective bargaining and has served as an awareness exercise, and it is consequently reasonable to assume that more and more educational issues will go to the courts for ajudication.

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[435] People v. New York Law School, 22 N.Y.S. 663 (1893)

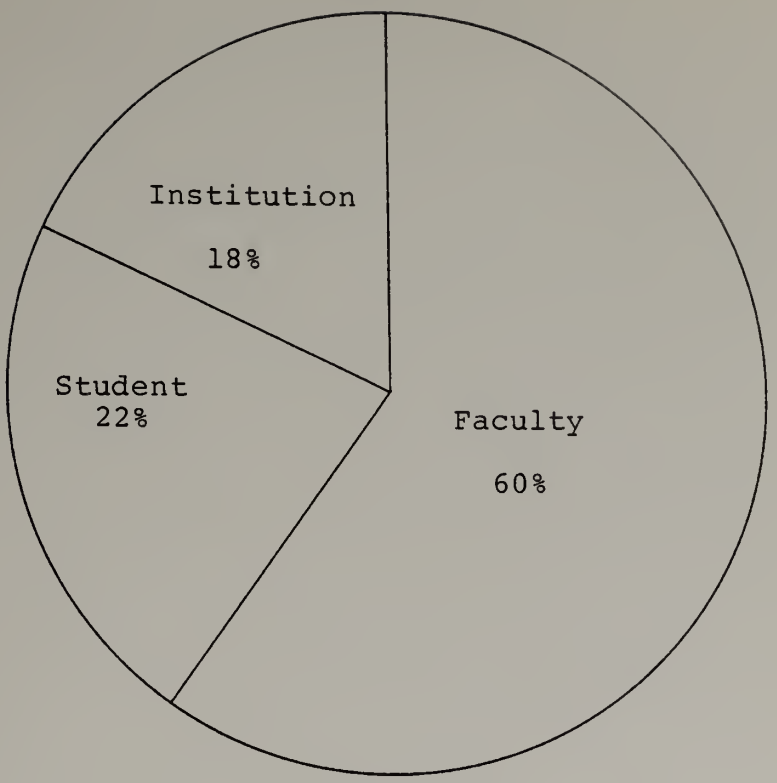

Figure 13. Ratio of issue emanence constituent category by percentage, in 100 cases in higher education which involve legal issues relative to the law of contract.

The sixty-to-forty ratio is important for faculty because they are twice as likely as students or institutions to be participants in litigation. It is important for administrators because they are likely to have to oppose faculty in contract litigation. This research informs the task of quasi-legal education.

4. Fifty-eight percent of the cases involved "Performance and Breach." Of these, fifty-five percent were in a combination of two categories (of eight)--"Expressed or Implied" and "Offer and Acceptance."

Discussion. Table 5, page 355, indicates that fifty-eight percent of the litigations in the 100 cases were based on issues of "Performance and Breach." This reiterates the need for substantive information for educational personnel. The high issue emanence in this category reflects the void of information relative to accountability for terms previously agreed upon. A great deal of litigation could be prevented if there were a clear understanding that indeed a contract existed when it was made. The need for this information is further reflected in the predominant issue emanence in the area of "Offer and Acceptance" and "Expressed or Implied" contracts.

Fifty-five percent of the fifty-eight percent of suits were in the area of "Expressed or Implied" and "Offer and Acceptance." The increase in these two areas of issue

TABLE 5

ANALYSIS OF 100 CASES ACCORDING TO AREAS OF LAW OF CONTRACT IN ISSUE

Higher Education Selected Cases / Related Area	Law of Contract							
	Expressed or Implied	Offer and Accept	Consideration	Capacity	Fraud, Mistake, Duress	Illegality	Statute of Frauds	Performance and Breach
100 Cases	15	17	1	3	3	3	0	58

Source: 100 Cases.

emanence demonstrates a higher incidence of misunderstandings or misinformation. Ignorance of the law may be inferred. Since "Ignorance of the Law is no Excuse" is a basic maxim of law--education in this area is pertinent.

Conclusions

Six major conclusions are derived from this study:

1. Legal history informs on pertinent issues relative to contract law and public higher education.

Discussion. An understanding of the law of contract is pertinent in the educational preparation of faculty and administrative personnel in higher education. This informational base (quasi-legal) will help them understand the how and why of the "legalism" of today's society and its educational movement, which is beginning to be noticeable. In some instances, the "legalism" of today's society is proliferating critical issues in public higher education. This knowledge will also assist the educator to evaluate not only the law, but also the fallacies being presented.

2. The cognitive content of quasi-legal training for faculty and administrative personnel in higher education should be primarily in seven areas: (1) Performance and Breach, (2) Offer and Acceptance, (3) Expressed or Implied, (4) Capacity, (5) Fraud, Mistake and Duress, (6) Illegality and (7) Consideration.

Discussion. Analysis of the 100 cases in relation to the area of the law of contract, as delimited for this study (Table 5, page 355), indicates that issues relative to seven

of the major areas of contract law out of eight were in issue. Fifty-eight percent of the issues in litigation related to "Performance and Breach" of the contract, while forty-two percent involved all other areas of the law of contract (Re: Figure 14, page 358). Not one issue arose in relation to the "Statute of Frauds." Therefore, the identification of the issue emanence, with the exception of the Statute of Frauds, seem to be somewhat directive in the determinant of content of the legal training to which participants in higher education should be subjected. The fact that not one issue was litigated in relation to the "Statute of Frauds" would seem to indicate that this area of the law of contract need not be included in the quasi-legal training of educators.

The cognitive content for the quasi-legal training of faculty and administrative personnel in higher education in the Commonwealth has been synthesized on pages 252-332. This research is organized according to the area of the law of contract delimited for this study and derived from the researcher's analysis of 550 cases which were actions in contract.

3. Quasi-legal education is needed for all professional personnel in public higher education.

Discussion. Ordinarily institutions of higher education have litigations as do business or industry. It is

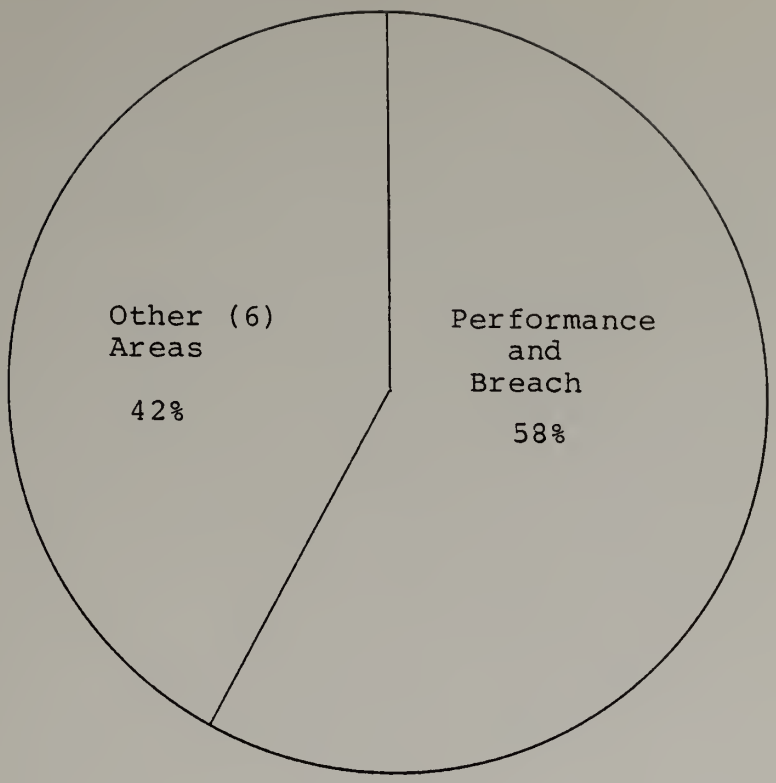

Figure 14. Ratio of litigation due to issues relative to the performance and breach of contracts as compared to the other six areas reported in Table 1.

inherent in the "modus operande." However, by virtue of their production, institutions of higher education have litigation in the law of contract which infringe on the professional personnel and the student body. This is where the contract litigation in higher education differs from general business management.

In the faculty-emanated suits in this study, thirty-eight percent of the judgments were in favor of the plaintiff faculty while sixty-two percent were against the faculty. Faculty-based suits may be inferred to be on the increase. To the extent that the sample is representative, the facts indicate that fifteen percent of the faculty-initiated suits were in the year 1974, as compared to thirty-two percent in the year 1975 and forty-six percent in the 1976-1977 period. The 1977 data are combined, since this research was done early in the spring of 1977. The 1977 figures are not representative of total litigation in 1977.

In Barrett v. Iowa Community College, the plaintiff was a librarian.[436] The football coach was the litigant in Feldman v. Regents of New Mexico.[437] On the basis of this finding, the researcher modifies the thesis from faculty and

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[436] Barrett v. Iowa Community College, 221 N.W. 2d 781 (1974).

[437] Feldman v. Regents of New Mexico, 540 P. 2d 872 (1975).

administrative personnel to all professional personnel.

4. Preventive quasi-legal education for all professional personnel, those who contract with professional personnel (administrators) and to a lesser degree, students, would enhance the internal harmony of institutions of higher education.

Discussion. Quasi-legal information should begin to forewarn institutions of the legal consequences of procedural error and misfeasance. It is patently clear that the misunderstandings leading to the faculty-emanated suits were due to misfeasance rather than malfeasance. If faculty better understood the nature of a contract, its conditions and relationships, there is a strong chance that at least one-half of the cases in the area of "Performance and Breach" would be eliminated.

5. Quasi-legal education programs should begin to focus on student-initiated litigation.

Discussion. With the increase in consumer concern, it is also reasonable to assume that there will be an increase in the emanence of issues in the courts by students in public higher education. To the extent that the sample is representative, the research indicates that eight of the twenty-two student-litigated suits were in 1976. Thirteen percent were in the early 1977 term. Therefore, in the 1976 and 1977 studied period, fifty-one percent of the student-initiated cases were litigated as compared to a total of thirteen percent in 1975 and thirty-seven percent in the 1966-1974

period. It is logical to assume that a complete study of the 1977 litigations would demonstrate an increase in litigations over 1976.

Colleges and universities today are continually offering students accessiblity to legal services to wade through the multiple issues they are presenting within the educational institutions. An analysis of the court decisions in the student-litigated cases indicates that the students won decisions in sixty percent of the cases and lost only forty percent, almost a reversal of the faculty judgments. Student related suits also covered a broader spectrum in terms of the areas of contract law (issue emanance) involved in litigated issues. Therefore, planners of quasi-legal education programs need not only to prepare institutions for a surge of student-initiated litigation but educate professional personnel for survival in our legal society. Students are now winning twice as often as faculty.

6. Elimination of misunderstandings of contractural relationships would reduce both monetary and human costs.

Discussion. The determination of legal rights or issues in the judicial system involves diverse monetary expenditures. Depending on the outcome of the suit the monetary expenditures swing from a complete reimbursement for

the damages to the other end of the pendulum, a complete loss.

There is no way to calculate the toll in human relations. It suffices to say that the human relations between the two litigants are never again as good. In some cases, the winner carries for life the stigma of having contended.

Recommendations for Future Research

On the basis of the principal findings arrived at as a result of this research, the investigator recommends that further studies be initiated in two areas: (1) collective bargaining, and (2) student-initiated litigation.

At a time when collective bargaining rights are being legislated for faculty in higher education, there is concurrently a trend toward multicampus systems centrally controlled. Moreover, the educational delivery system must educate increasing numbers of students from increasingly diverse segments of the population.[438] Consumers with diverse needs are, therefore, increasing in institutions in which there will be increased demands for educational reform, thus, increasing the potential for increased litigation in the contract areas singled out for future study.

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[438]Eugene C. Lee and Frank M. Bowen, "The Multicampus University: A Study of Academic Governance," The Carnegie Commission on Higher Education, edited by Lewis Mayhew, p. 263.

While it was outside the purpose of this study to investigate, it is unmistakably apparent that inquiry into the most predominant area of litigation in higher education-faculty contracts must be expanded to incorporate the legal concepts relating to collective bargaining, since the trend is toward collective negotiations in regard to faculty contracts. This is in the nature of a concomitant discovery, since the study excluded collective bargaining from consideration.

Future research should also monitor student-initiated litigation as a means of determining what proportion of quasi-legal education it should occupy and to determine what aspects of the institution-student relationships are at issue.

BIBLIOGRAPHY

Higher Education

Astin, A. W. The College Environment. Washington, D.C.: American Council on Education, 1968.

Atwell, C. A., and Sullins, R. B. "Cooperative Faculty Development." Community and Junior College Journal, vol. 44 (November 1973),

Bachrach, P. The Theory of Democratic Elitism: A Critique. Boston: Little, Brown and Company, 1967.

Baldridge, J. V. Academic Governance. Berkeley: McCutchan, 1971.

Baldridge, J. V. Power and Conflict in the University. New York: Wiley, 1971.

Baldridge, J. V., and Deal, T. E. Managing Change in Educational Organizations. Berkeley: McCutchan, 1975.

Banfield, E. Political Influence. New York: The Free Press, 1961.

Barzun, J. The American University: How It Runs--Where It Is Going. New York: Harper and Row, 1968.

Beckhard, R. Organizational Development Strategies and Models. Reading, MA: Addison-Wesley, 1969.

Beer, S. Decision and Control. New York: Wiley, 1966.

Bennis, W. G.; Benne, K. D.; and Chin, R. (eds.). The Planning of Change. (2nd ed.). New York: Holt, Rinehart, and Winston, 1969.

Bennis, W. G. The Leaning Ivory Tower. San Francisco: Jossey-Bass, 1973.

Best, J. W. Research in Education. New Jersey: Prentice Hall, Inc., 1970.

Birenbaum, W. M. "From Class to Mass--Sociology and the Science of Education." Sixth Congress of the International Association of Science and Education. Paris (September 3-7, 1973).

Boyer, R., and Crockett, C. "Organizational Development in Higher Education." J. of Higher Ed., vol. 44 (May, 1973).

Bushnell, D. S. Organizing for Change: New Priorities for Community Colleges. New York: McGraw-Hill, 1973.

Carnegie Commission on Higher Education. "Governance of Higher Education: Six Priority Problems." April, 1973.

Carnegie Commission on Higher Education. "The More Effective Use of Resources." June, 1972.

Carnegie Commission on Higher Education. "Priorities in Action." October, 1973.

Cheit, E. The Management Systems Challenge: How to Be Academic Though Systematic. Washington, D.C.: American Council on Education, 1973.

Commission on Academic Tenure in Higher Education. "Faculty Tenure." March, 1973.

Commission on Human Resources and Advanced Training. "America's Resources of Specialized Talent." 1954.

Committee on Non-Tenured Faculty of the Tufts Chapter of the American Association of University Professors. "Tenure Quotas at Tufts: Path to Mediocrity." January, 1973.

Cross, K. P. Beyond the Open Door: New Students to Higher Education. San Francisco: Jossey-Bass, 1971.

Dahl, R. Modern Political Analysis. New Jersey: Prentice Hall Inc., 1976.

Ellman, E. B. "The Master Contract in Public Education." Conference Proceedings: 14th Annual Meeting, National Organization on Legal Problems of Education. Kansas: National Organization on Legal Problems of Education, 1968.

Emerging Problems in School Law. Kansas: National Organization on Legal Problems in Education, 1972.

Fischer, L., and Schimmel, D. The Civil Rights of Teachers. New York: Harper and Row, 1973.

Folger, J., and Nam, C. B. Education of the American Population. U.S. Department of Commerce, 1967.

Garbarino, J., and Aussieker. Faculty Bargaining. New York: McGraw-Hill, 1975.

Gerwin, A. "Political Justice." Social Justice Review. New Jersey: Central Bureau Catholic Union of America, 1962.

Gross, E., and Grambsch, P. Changes in University Organization. Washington, D.C.: American Council on Education, 1974.

Hershey, P., and Blanchard, K. H. Management of Organizational Behavior: Utilizing Human Resources. New Jersey: Prentice Hall, Inc., 1977.

Hodgkinson, H., and Meeth, L. (eds.). Power and Authority. San Francisco: Jossey-Bass, 1971.

"Interesting Times for School Administrators." Kansas: National Organization on Legal Problems in Education, vol. 4, 1974.

Lee, E. C., and Bowen, F. M. "The Multicampus University--A Study of Academic Governance." L. Mathew (ed.). The Carnegie Commission on Higher Education. San Francisco: Jossey-Bass, 1973.

Liberman, Jethro K. Milestones: 200 Years of American Law--Milestones in Our Legal History. St. Paul: West Publishing Co., 1976.

Light, D. W.; Marsden, L. R.; and Corl, T. C. The Impact of the Academic Revolution on Faculty Careers. Washington, D.C.: American Association of Higher Education, 1972.

Lipset, S. M. "The Politics of Academia." In D. E. Nichols (ed)., Perspectives on Campus Tensions. Washington, D.C.: American Council on Education, 1970.

Petit, T. "Alternative Approaches to Power, Influence, and Authority." In J. M. McGuire (ed.), Contemporary Management. Englewood Cliffs: Prentice Hall, 1974.

Schimmel, D. "The Bill of Rights and The Public Schools: Change and Challenge." Social Education. Virginia: National Council for Social Studies, 1975.

Schimmel, D., and Fischer, L. The Civil Rights of Students. New York: Harper and Row, 1975.

Trow, M., and Lipset, S. National Surveys of Faculty and Students in American Higher Education. Berkeley, Calif.: Center for Research and Development in Higher Education, 1969.

Van Alstyne, W. W. "The Rights of Teachers and Professors." The Rights of Americans: What They Are--What They Should Be. N. Dorsen (ed.). New York: Vintage Books, 1971.

Wasserman, P. et al. Encyclopedia of Business Information Source. Detroit: Gale Research Co., 1976.

Young, Honorable Don J. "Interesting Times for School Administrators." NOLPE School Law Journal, vol. 4 (#2), 178-179, 1974.

Case Citations

Higher Education/Contract

Abrams v. New School for Social Research, 390 N.Y.S. 2d 818 (1976)

Alberti v. County of Erie, 360 N.Y.S. 2d 343 (1974)

American Association of University Professors, Bloomfield College Chapter v. Bloomfield College, 322 A. 2d 846 (1974)

American Training Services, Inc. v. Commerce Union Bank, 415 F. Supp. 1101 (1976)

Anapol v. University of Delaware, 412 F. Supp. 675 (1976)

Appel Media v. Clarion State College, 327 A. 2d 420 (1974)

Bagby v. Trustees of Claremore Junior College Authority, 525 P. 2d 1355 (1974)

Barker-Scotia College, Inc. v. City of New York, 390 F. Supp. 525 (1975)

Barszcz v. Board of Trustees of Community College Dist. No. 504, Illinois, 400 F. Supp. 675 (1975)

Barrett v. Eastern Iowa Community College District, 221 N.W. 2d 781 (1974)

Basch v. George Washington University, 370 A. 2d 1364 (1977)

Beck v. Board of Trustees of State Colleges, 344 A. 2d 273 (1975)

Begley v. The Corporation of Mercer University, 367 F. Supp. 908 (1973)

Billmeyre v. Sacred Heart Hospital of the Sisters of Charity, Inc., 331 A. 2d 313 (1975)

Blouin v. Loyola University, 506 P. 2d 20 (1975)

Board of Governors v. Building Systems Housing Corp., 233 N.W. 2d 195 (1975)

Board of Regents v. Roth, 408 U.S. 564 (1972)

Board of Regents of State University, State of Wisconsin v. Davis, 120 Cal. Reptr. 407 (1975)

Board of Regents of the University of Texas v. S & G Construction Co., 592 S.W. 2d 90 (1975)

Board of Trustees of Howard Community College v. John K. Ruff, Inc., 366 A. 2d 360 (1976)

Brady v. Board of Trustees of Nebraska State Colleges, 242 N.W. 2d 616 (1976)

Board of Trustees of the State College of Maryland v. Sherman, 373 A. 2d 626 (1977)

Brown v. Wichita State University, 540 P. 2d 66 (1975)

Bruce v. Board of Regents for North West Missouri State University, 414 F. Supp. 559 (1976)

Burdeau v. Trustees of California State College, 507 F. 2d 770 (1974)

Busbee v. Georgia Conference A. A. U. P., 221 S.E. 2d 437 (1975)

Cannon v. Stevens School of Business, Inc., 560 P. 2d 1383 (1977)

Cardo v. Boyer, 374 N.Y.S. 2d 360 (1975)

Carrol v. Onodaga Community College, 384 N.Y.S 323 (1976)

Casumano v. Ratchford, 507 F. 2d 980 (1974)

Cherinsky v. New York City Community College, 377 N.W.S. 2d 97 (1975)

Chung v. Park, 337 F. Supp. 524 (1974)

City of Ann Arbor v. University Cellar, Inc., 237 N.W. 2d 535 (1975)

Civil Service Employees Association, Inc. v. State University of Stonybrook, 368 N.Y.S. 2d 927 (1974)

Cohen v. Illinois Institute of Technology, 524 F. 2d 818 (1975)

Collins v. Wolfson, 498 F. 2d 1100 (1975)

Commonwealth v. Howell, 181 A. 2d 903 (1962)

Connecticut State Employees Association v. Board of Trustees of University of Connecticut, 345 A. 2d 36 (1974)

Curator of University of Missouri v. Nebraska Prestressed Concrete Co., 526 S.W. 2d 903 (1975)

Daly v. Board of Trustees, 524 S.W. 2d 410 (1975)

DeBonis v. Hudson Valley Community College, 389 N.Y.S. 2d 647 (1976)

Decker v. Worcester Junior College, 336 N.E. 2d 909 (1975)

Delaware Technical and Community College v. C. & D. Contractors, Inc., 338 A. 2d 528 (1975)

DeMarco v. University of Health Sciences, 352 N.E. 2d 356 (1976)

Ducorbier v. Board of Supervisors of Louisiana State University, 386 F. Supp. 202 (1974)

Eden v. Board of Trustees of State University, 374 N.Y.S. 2d 686 (1975)

Embry-Kiddle Aeronautical University v. Ross Aviation, Inc., 504 F. 2d 896 (1974)

Endress v. Brookdale Community College, 364 A. 2d 1080 (1976)

Feldman v. Regents of New Mexico, 540 P. 2d 872 (1975)

Ferner v. Harris, 119 Cal. Rptr. 385 (1975)

First Equity Corp. of Florida v. Utah State University, 544 P. 2d 887 (1975)

Franklin v. Atkins, 409 F. Supp. 439 (1976)

Georgia Association of Education v. Harris 403 F. Supp. 961 (1975)

Giles v. Howard University, 428 F. Supp. 603 (1977)

Goodman v. New York University, 369 N.Y.S. 2d 501 (1975)

Goodyear v. Junior College District St. Louis, 540 S.W. 2d 621 (1976)

Gorman v. University of Miami, 340 So. 2d 1180 (1977)

Gras v. Clark, 361 N.E. 2d 316 (1977)

Green v. Howard University, 271 F. Supp. 609 (1967)

Green v. Richmond, 337 N.E. 2d 691 (1975)

Grimm v. Cates, 532 F. 1034 (1976)

Guillot v. Board of Trustees of Mississippi Gulf Coast Jr. College, 317 So. 2d 920 (1975)

Gupta v. Boyer, 391 N.Y.S. 2d 255 (1977)

Healy v. Larson, 323 N.Y.S. 2d 625 (1971)

Hill v. North Central Area Vocational-Technical School, 310 So. 2d 104 (1975)

Holstrop v. Board of Junior Colleges, 523 F. 2d 569 (1975)

Hvac and Sprinkler Contractor Association, Inc. v. The State University Construction Fund, 364 N.Y.S. 2d 422 (1975)

Iowa State University of Sciences and Technology v. United States, 500 F. 2d 508 (1974)

Jacobsen v. Leonard, 406 F. Supp. 515 (1976)

Jessen Associates v. Bullock, 531 S.W. 2d 593 (1975)

Jones v. Vassar College, 299 N.Y.S. 2d 283 (1969)

Kalme v. West Virginia Board of Regents, 539 F. 2d 1346 (1976)

Kilcoyne v. Morgan, 405 F. Supp. 828 (1975)

Kiley v. Lavine, 358 N.Y.S. 2d 331 (1974)

King v. Conservatorio de Musica de Puerto Rico, 378 Supp. 746 (1974)

Krawez v. Stans, 306 F. Supp. 1230 (1969)

La Temple v. Wamsley, 549 F. 2d 185 (1977)

Lewis v. Salem Academy and College, 208 S.E. 2d 404 (1974)

Lyman v. Swartley, 385 F. Supp. 661 (1974)

Lyons v. Salve Regina College, 422 F. Supp. 1354 (1976)

Mahavougsana v. Hall, 401 F. Supp. 381 (1975)

Mahavougsana v. Hall, 529 F. 2d 448 (1976)

McClanahan v. Cochise College, 540 P. 2d 744 (1975)

McLachlan, et. al., v. Tacoma Community College District No. 22, 541 P. 2d 1010 (1975)

Michigan College Federation of Teachers v. Lake Michigan Community College, 518 F. 2d 1091 (1975)

Middlebury College v. Chandler, 16 Vermont 683 (1844)

Miller v. Long Island University, 380 N.Y.S. 2d 917 (1976)

Moore v. Kibbee, 385 F. Supp. 765 (1974)

Nace v. Oregon State System of Higher Education, 543 P. 2d 687 (1975)

Neal v. Junior College District of East Central Missouri, 556 S.W. 2d 580 (1977)

Orr v. Koefood, 377 F. Supp. 673 (1974)

Pace College v. Commission on Human Rights of the City of New York, 339 N.E. 2d 2 (1975)

Papadopoulous v. Board of Higher Education, 511 P. 2d 854 (1973)

People v. New York Law School, 22 N.Y.S. 663 (1893)

Perry v. Sinderman, 408 U.S. 600 (1972)

Phillips v. Puryear, 403 F. Supp. 80 (1975)

Phillips v. Santa Fe Community College, 342 So. 2d 108 (1977)

Phillips v. State Board of Higher Education, 490 P. 2d 1005 (1971)

Powe v. Miles, 407 U.S. 2d 73 (1968)

President and Trustees of Colby College v. Colby College, New Hampshire 508 F. 2d 804 (1975)

Pryles v. State, 380 N.Y.S. 2d 628 (1975)

Quigley v. Capalonga, 383 N.Y.S. 2d 935 (1976)

Rehor v. Case Western Reserve University, 331 N.E. 2d 446 (1975)

Robertson v. District of Columbia Board of Higher Education, 359 A. 2d 28 (1976)

Runyon v. McCrary, 96 S. Ct. 2596 (1976)

Saunders v. Reorganized School District No. 2 of Osage County, 520 S.W. 2d 29 (1975)

Schlecting v. Bergstrom, 511 P. 2d 846 (1973)

Scott v. University of Delaware, 385 F. Supp. 937 (1974)

Shaw v. Board of Trustees of Frederick Community College, 549 F. 2d 929 (1976)

Shepphard v. West Virginia Board of Regents, 378 F. Supp. 4 (1974)

Simon v. Boyer, 380 N.Y.S. 2d 178 (1976)

Skehan v. Board of Trustees of Bloomsberg State College, 538 F. 2d 53 (1976)

Smith v. Greene, 545 P. 2d 550 (1976)

Soni v. Board of Trustees of University of Tennessee, 513 F. 2d 347 (1975)

State ex rel. Chapdelaine v. Torrence, 532 S.W. 2d 542 (1975)

State ex. rel. Sigall, et. al., v. Aetna Cleaning Contractors of Cleveland, Inc., et. al., 353 N.E. 2d 913 (1974)

Steinberg v. Chicago Medical School, 354 N.E. 2d 586 (1976)

Sterling v. University of Michigan, 68 N.W. 253 (1896)

Stewart v. Bailey, 396 F. Supp. 1381 (1975)

Swatek v. Board of Regents of Oklahoma College, 535 P. 2d 295 (1975)

Talandi Construction Corp. v. Illinois Building Authority, 321 N.E. 2d 154 (1974)

Thompson v. East Baton Rouge Parish School Board, 303 So. 2d 855 (1974)

Tobin v. Louisiana State Board of Education, 319 So. 2d 822 (1975)

Tuskega Inst. v. May Refrigeration Co., Inc., 344 So. 2d 156 (1977)

Trivier v. Atlanta University, Inc., 234 S.E. 2d 342 (1977)

Trustees of Stigmatine Fathers, Inc. v. Secretary of Administration and Finance, 341 N.E. 2d 662 (1976)

Turner v. State, 374 N.Y.S. 2d 731 (1975)

Tyler v. College of William and Mary, 429 F. Supp. 29 (1977)

Tyler v. Jefferson City-Dubois Area Vocational-Technical School, 341 A. 2d 235 (1975)

University of Colorado v. Silverman, 555 P. 2d 115 (1976)

University of Texas System v. Robert E. McKee, Inc., 521 S.W. 2d 944 (1975)

Vallejo v. Jamestown College, 244 N.W. 2d 753 (1976)

Van Buren v. Pima Community College, 540 P. 2d 763 (1975)

Van de Vati v. Boling, 379 F. Supp. 925 (1974)

Wilkinson v. Louisiana State University, 316 So. 2d 412 (1975)

Contracts

Abbott v. Doane, 40 N.E. 197 (1895)

Abrams v. Factory Mutual Liability Ins. Co., 10 N.E. 2d 82 (1937)

Adamouski v. Curtis Wright Flying Service, Inc., 15 N.E. 2d 467 (1938)

Adams v. Nichols, 19 Pick. 279 (1823)

Adamsky v. Mendes, 96 N. E. 2d 236 (1950)

Aiken v. Hyde, 93 Mass. 183 (1865)

Aldrich v. Ames, 9 Gray 76 (1857)

Aldrich v. Inhabitants of Blackstone, 128 Mass. 148 (1879)

Alevy v. Downstate Medical Center of New York, 359 N.Y.S. 2d 426 (1974)

Allyn v. Allyn 28 N.E. 779 (1891)

Analogic Corp. v. Data Translation Inc., 358 N.E. 2d 804 (1976)

Anderson v. K. G. Moore Inc., 376 N.E. 2d 1238 (1978)

Andre v. Maguire, 26 N.E. 2d 347 (1940)

Antonelli v. Hammond, 308 F. Supp. 1329 (1970)

Arizona Commercial Mining Co., v. Iron Cap Copper Co., 128 N.E. 4 (1920)

Arnold v. Richmond Iron Works, 1 Gray 439 (1854)

Arpin v. Owens, 3 N.E. 25 (1885)

Ashcroft v. Butterworth, 136 Mass. 511 (1884)

Audette v. L'Union St. Joseph, 59 N.E. 668 (1901)

Bacon v. Parker, 137 Mass. 309 (1884)

Baetjer v. New England Alcohol Co., 66 N.E. 2d 798 (1946)

Barker v. Rathvon, 145 N.E. 866 (1942)

Barlow v. Ocean Ins. Co., 4 Metc. 270 (1842)

Barnett v. Rosen, 126 N.E. 386 (1920)

Barrell v. Paine, 128 N.E. 17 (1920)

Barrett v. Carney, 150 N.E. 2d 276 (1958)

Barrie v. Quimby, 92 N.E. 451 (1910)

Bates v. Southgate, 31 N.E. 2d 551 (1941)

Battaglis v. General Motors Corp., 169 F. 2d 254 (1948)

Bauer v. Bond and Goodwin Inc., 188 N.E. 708 (1934)

Beaner v. Raytheon Manufacturing Co., 12 N.E. 2d 807 (1938)

Bell v. City of Boston, 101 Mass. 506 (1869)

Belluci v. Foss, 138 N.E. 551 (1923)

Bennett v. Aetna Inc. Co., 88 N.E. 335 (1909)

Beury Jefferson Corp. v. Gross, 358 N.E. 2d 757 (1977)

Bigby v. U.S., 188 U.S. 400 (1902)

Bishop v. Eaton, 37 N.E. 665 (1894)

Blackwell v. E. M. Helides, Jr., Inc., 331 N.E. 2d 54 (1975)

Blount v. Dillaway et. al., 85 N.E. 477 (1908)

Bogigian v. Booklovers Library, 79 N.E 769 (1907)

Boles v. Katz, 164 N.E. 323 (1960)

Boston Housing Authority v. Consolidated Electric Co., 358 N.E. 2d 246 (1976)

Boston Beer Co. v. Massachusetts, 97 U.S. 25 (1877)

Boston Plate and Window Glass Co. v. John Bowen Co., 141 N.E. 2d 715 (1957)

Boston and Maine R. R. Co. v. Barttett, 3 Cush. 224 (1849)

Boyden v. Boyden, 9 Metc. 519 (1845)

Brady v. Rea, 14 Allen 20 (1867)

Braeur v. Shaw, 46 N.E. 617 (1897)

Breen v. Burns, 182 N.E. 294 (1932)

Brewer v. Dyer, 7 Cush. 337 (1851)

Brewster v. Weston, 126 N.E. 271 (1920)

Broman et. al., v. Byrne, 78 N.E. 2d 616 (1948)

Bronson v. Kinzie, 1 How. 31 (1843)

Brown v. Foster, 113 Mass. 136 (1873)

Brown v. Nealley, 36 N.E. 464 (1894)

Bruchett v. Allied Concord Fin. Corp., 396 P. 2d 186 (1967)

Bryant v. Rich, 106 Mass. 180 (1970)

Buccella v. Schuster, 164 N.E. 2d 141 (1960)

Burgess Sulphite Fibre Co. v. Broomfield, 62 N.E. 367 (1902)

Butterfield v. Byron, 27 N.E. 667 (1891)

Butchers Union, etc., Co. v. Crescent City, etc., Co., 111 U.S. 746 (1884)

Butler v. Butler, 113 N.E. 577 (1916)

Butler v. Prussian, 147 N.E. 892 (1925)

Caggiano v. Marchegriano, 99 N.E. 2d 861 (1951)

Cardarelli Construction Co. v. Groton-Dunstable Regional School District, 349 N.E. 2d 383 (1976)

Campbell v. Holt, 115 U.S. 620 (1885)

Carnig v. Carr, 46 N.E. 117 (1897)

Carnen v. Forrest, 307 N.E. 864 (1974)

Carpenter v. Grow, 141 N.E. 859 (1923)

Carton v. Shea, 45 N.E. 2d 826 (1942)

Casella v. Sneierson, 89 N.E. 2d 8 (1949)

Cazenovia College v. Patterson, 360 N.Y.S. 2d 84 (1974)

C. W. Hunt Co. v. Boston Elevated R. Co., 85 N.E. 446 (1908)

Chamberlin v. Employer Liability Assur. Corp., 194 N.E. 310 (1935)

Champlin v. Jackson, 58 N.E. 2d 757 (1945)

Chander v. Simmons, 97 Mass. 508 (1867)

Charles River Bridge v. Proprietors of the Warren Bridge, 11 P. 420 (1837)

Chase v. Aetna Rubber Co., 75 N.E. 2d 637 (1947)

Chase v. Fitz, 132 Mass. 359 (1882)

Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945)

Chatam Pharmaceutical, Inc., v. Angier Chemical Co., Inc., 196 N.E. 2d 852 (1974)

Chung v. Park, 377 F. Suppl. 524 (1974)

Church of God in Christ, Inc. v. Congregation Kehilbath Jacob, 353 N.E. 2d 669 (1976)

City of El Paso v. Simmons, 337 U.S. 902 (1965)

Clark v. Gulesian, 84 N.E. 94 (1908)

Clark v. Roberts, 62 N.E. 253 (1902)

Cleary v. Schier, 120 Mass. 210 (1876)

Close v. Lederle, 424 F. 2d 988 (1970)

Cochrane v. Forbes, 153 N.E. 566 (1926)

Codman v. Dumaine, 144 N.E. 408 (1924)

Colonial Development Corp. v. Bragdon, 106 N.E. 633 (1914)

Collins v. Wolfson, 498 F. 2d 1100 (1975)

Columbia Ry., Gas and Electric Co. v. State of So. Carolina, 261 U.S. 236 (1923)

Conant v. Evans, 88 N.E. 438 (1909)

Conner v. Tewksbury, 63 N.E. 2d 348 (1945)

Cooper v. Cooper, 17 N.E. 892 (1888)

Continental Ill. National Bank and Trust Co. v. Chicago, R. I. and P. Ry. Co., 294 U.S. 648 (1935)

Coragulian v. Rudd, 184 N.E. 717 (1933)

Costonis v. Medford Housing Authority, 176 N.E. 2d 25 (1961)

Cottage St. M. E. Church v. Kendall, 121 Mass. 528 (1877)

Council v. Cohen, 21 N.E. 2d 967 (1939)

Counelis v. Counelis, 54 N.E. 2d 177 (1944)

Creed v. Apog, 376 N.E. 2d 154 (1978)

Cromwell v. Norton, 79 N.E. 433 (1906)

Crumer Mfg. Co. v. Rousseau, 132 N.E. 723 (1921)

Cummings v. Arnold, 3 Metc. 486 (1842)

Curran v. O'Donnell, 128 N.E. 408 (1920)

Cutler v. United Show Machinery Corp., 174 N.E. 507 (1931)

Cygan v. Megathlin, 96 N.E. 2d 702 (1951)

Dale System, Inc., v. Wichroski, 69 N.E. 2d 241 (1903)

Daniels v. Newton, 144 Mass. 530 (1874)

Davis v. H. S. and M. W. Snyder, Inc., 147 N.E. 30 (1925)

Day v. Canton, 119 Mass. 513 (1876)

Dean v. Skiff, 128 Mass. 174 (1880)

De Ciccio v. Barker, 159 N.E. 534 (1959)

Dedham Lumber Co. v. Harting, 180 N.E. 296 (1932)

Delano v. Montague, 4 Cush. 42 (1849)

Dellamano v. Francis, 33 N.E. 2d 327 (1941)

Deloranfano v. Delafano, 132 N.E. 668 (1956)

Derenzo Co. v. Taylor, Woodrow, Blitman Construction Corp., et. al., 334 N.E. 2d 636 (1975)

Devlin v. Mayor and Aldermen of New York, 63 N.Y. 8 (1875)

Dickinson v. Riverside Iron Works, Inc., 372 N.E. 2d 1302 (1978)

Diebold Safe and Lock Co. v. Morse, 115 N.E. 431 (1917)

Domenicus v. Fleisker, 81 N.E. 191 (1907)

Donohue v. Woodburg, 6 Cush. 148 (1850)

Donovan v. Eastern Racing Assoc., 86 N.E. 903 (1949)

Dorel Steel Corp. v. Modular Constructors, Inc., 334 N.E. 2d 76 (1975)

Douglas v. Holyoke Machine Co., 124 N.E. 478 (1919)

Douglas v. Lowell, 80 N.E. 510 (1907)

Douillette v. Parmeter, 139 N.E. 526 (1957)

Downey v. Union Trust, 45 N.E. 373 (1942)

Downing v. Brennan, 122 N.E. 729 (1919)

Drude v. Curtis, 67 N.E. 317 (1903)

Duca v. Lord, 117 N.E. 2d 145 (1954)

Dwight R. Woodford Co., v. Johnson, 183 N.E. 710 (1933)

Earle v. Coburn, 130 Mass. 596 (1881)

East N.Y. Savings Bank v. Haha, 326 U.S. 230 (1945)

Eastern Expanded Metal Co. v. Webb Granite Co., 81 N.E. 251 (1907)

Eastman v. Allen, 31 N.E. 2d 547 (1941)

Edler v. Frazier, 156 N.W. 182 (1916)

Ellery v. Cunningham, 1 Metc. 112 (1840)

Emery v. Crowley, 359 N.E. 2d 1256 (1976)

Epder Corp. v. Richmond, 75 N.E. 2d 238 (1947)

Erhard v. F. W. Woolworth Co., 372 N.E. 2d 1277 (1978)

Estabrook v. Wilcox, 115 N.E. 233 (1917)

Exchange Bank v. Rice, 107 Mass. 37 (1871)

Faitoute Iron and Steel Co. v. City of Asbury Park, 316 U.S. 502 (1942)

Feakes v. Bozyczko, 369 N.E. 2d 978 (1977)

Fencer v. Wills, 156 N.E. 841 (1927)

Fennell v. Russell, 184 N.E. 675 (1933)

Fessenden v. Mussey, 11 Cush. 127 (1853)

Fischer v. Drew, 141 N.E. 875 (1924)

Fischera v. City of Laurence, 44 N.E. 2d 779 (1942)

Fiske v. Doucette, 92 N.E. 455 (1910)

Fletcher v. Peck, 6 Cranch. 87 (1810)

Fonesca v. Cunard, S. S. Co., 27 N.E. 665 (1891)

Forman v. Gadonas, 142 N.E. 87 (1891)

Foss v. Hildreth, 10 Allen 78 (1865)

Foster v. Shubert Holding Co., 55 N.E. 2d 772 (1944)

Frank Fitzgerald, Inc. v. Pacella Brs., Inc., 310 N.E. 2d 329 (1974)

Freeman v. Fishman, 139 N.E. 846 (1923)

Freeman v. Teeling, 194 N.E. 677 (1935)

Fried v. Fried, 368 N.E. 2d 1222 (1977)

Freid v. Singer, 136 N.E. 609 (1922)

Friend Brothers, Inc. v. Seaboard Surety Co., 56 N.E. 2d 6 (1944)

Gaffney v. Hayden, 110 Mass. 137 (1872)

Gallop v. Fox, 30 A. 756 (1894)

Galvin v. Cavanaugh, 82 N.E. 2d 593 (1948)

Gelpcke v. City of Dubuque, 1 Wall 75 (1863)

Gill v. Gibson, 114 N.E. 198 (1916)

Gill v. Richmond, 337 N.E. 2d 902 (1975)

Gill v. Richmond Co-op Ass'n., 34 N.E. 2d 509 (1941)

Gillis v. Bonnelli-Adams Co., 187 N.E. 535 (1933)

Gladstone v. Murray Co., 50 N.E. 2d 958 (1943)

Goldstein v. D'Arcy, 87 N.E. 584 (1909)

Goldstein v. Katz, 91 N.E. 2d 237 (1950)

Gordon v. Levine, 83 N.E. 861 (1908)

Gould v. Thompson, 4 Metc. 224 (1842)

Grace v. Adams, 100 Mass. 505 (1868)

Graffen v. Pierce, 9 N.E. 819 (1887)

Graham v. Stanton, 58 N.E. 1023 (1901)

Grange Lumber v. Rowley, 326 U.S. 295 (1945)

Grant v. Carlisle, 101 N.E. 376 (1957)

Graves v. Adams Express Co., 57 N.E. 462 (1900)

Greaney v. McCormick, 173 N.E. 411 (1930)

Green v. Green, 9 N.E. 2d 413 (1937)

Green v. Richmond, 337 N.E. 2d 691 (1975)

Growers Outlet, Inc. v. Stone, 131 N.E. 2d 210 (1956)

Gutlon v. Marcus, 43 N.E. 125 (1896)

Hadlock v. Books, 59 N.E. 1009 (1901)

Hagar v. Norton, 73 N.E. 1073 (1905)

Hall v. Paine, 112 N.E. 153 (1916)

Hampson v. Larkin, 318 Mass. 716 (1945)

Hancock Bank and Trust Co. v. Shell Oil Co., 309 N.E. 2d 482 (1974)

Harness Trucks Sec., Inc. v. Bay State Raceway, Inc., 373 N.E. 2d 353 (1978)

Harriman v. Harriman, 12 Gray 341 (1858)

Harris v. Delco Products, Inc., 25 N.E. 2d 740 (1940)

Hastings et. al. v. Lovejoy, 2 N.E. 776 (1885)

Hawkes v. Keohoe, 79 N.E. 776 (1907)

Hay v. Green, 12 Cush. 282 (1853)

Haynes v. Blanchard, 80 N.E. 504 (1907)

Hays v. Port of Seattle, 251 U.S. 233 (1920)

Hayward v. Leonard, 7 Pick. 181 (1829)

Henchey v. Rathburn, 112 N.E. 862 (1916)

Hill v. Grat, 141 N.E. 593 (1923)

Hobbs v. Massoit Whip Co., 33 N.E. 495 (1893)

Hoffman v. Charlestown Bank, 231 Mass. 324 (1918)

Hoetz v. Western Union Tel. Co., 294 Mass. 543 (1936)

Holyoke Water Power Co. v. American Writing Paper Co., 300 U.S. 324 (1937)

Home Building and Loan v. Blaisdell, 290 U.S. 398 (1934)

Howard v. Zilch, 190 N.E. 2d 77 (1963)

Hughes v. Wamsutta Mills, 11 Allen 201 (1865)

C. W. Hunt Co. v. Boston Elevated R. Co., 85 N.E. 446 (1949)

Hurley v. Boston, 142 N.E. 919 (1924)

In Bishop v. Eaton, 37 N.E. 665 (1894)

In De'Marc v. Capaldi, 146 N.E. 2d 517 (1957)

In Dangelo v. Farina, 39 N.E. 2d 754 (1895)

In Lennox v. Murphy, 50 N.E. 664 (1898)

In Tocci v. Lembo, 92 N.E. 2d 254 (1950)

In re Wirthlin's Marriage, 527 P. 2d 147 (1974)

International Textbook Co. v. Martin, 108 N.E. 469 (1915)

Iowa State University of Science and Technology v. United States, 500 F. 2d 508 (1974)

Irving Trust Co. v. Day, 314 U.S. 556 (1942)

Johnson v. Norton Housing Authority, 375 N.E. 2d 1209 (1978)

Jones v. Hoar, 5 Pick. 285 (1827)

Jordan v. Dobbins, 122 Mass. 168 (1877)

Kaplan v. Shuer, 150 N.E. 9 (1926)

Kelly v. Weiss, 102 N.E. 2d 93 (1951)

Kemp v. Kemp, 142 N.E. 779 (1924)

Keown and McEvory v. Verlin, 149 N.E. 115 (1925)

Kenyon v. Shepard, 127 N.E. 426 (1920)

Kerwin v. Donaghy, 59 N.E. 2d 299 (1945)

Kirkley v. F. H. Robert Co., 167 N.E. 289 (1929)

Kolas v. Larochelle, 169 N.E. 662 (1930)

Krasner v. Berk, 319 N.E. 2d 879 (1974)

Kuzmeskus v. Pickup Motor Co., Inc., 115 N.E. 2d 461 (1953)

Kyle v. Kavanaugh, 103 Mass. 356 (1869)

La Chance v. Rogoli, 91 N.E. 2d 204 (1949)

Lampsaona v. Lariviere, 196 Mass. 34 (1936)

Lander v. Samuel Heller Leather Co., Inc., 50 N.E. 2d 962 (1943)

Lane v. Flint, 104 N.E. 570 (1914)

Lantz v. Chandler, 164 N.E. 2d 153 (1960)

Lariviere v. Lariviere, 24 N.E. 2d 659 (1939)

Larson v. So. Dakota, 278 U.S. 429 (1929)

Lascella v. Clark, 90 N.E. 875 (1910)

Lawrence v. Fox 20 N.Y 268 (1859)

Leavitt v. Fiberloid Co., 82 N.E. 682 (1907)

Lebold v. Inland Steel Co., 125 F. 2d 369 (1942)

Lefebve v. Town of Pembroke, 194 N.E. 698 (1935)

Leigh v. Rule, 121 N.E. 2d 854 (1954)

Lenox v. Murphy, 50 N.E. 644 (1898)

Leonard v. Woodward, 25 N.E. 2d 705 (1940)

Lewis v. Browning, 130 Mass. 173 (1881)

Lewis v. Salem Academy and College, 208 S.E. 2d 404 (1974)

Libman v. Levenson, 128 N.E. 13 (1920)

Lipson v. Southgate Park Corp., 189 N.E. 2d 191 (1963)

Lockwood Mfg. Co. v. Mason Regulator Co., 66 N.E. 420 (1903)

Lodi v. Goyette, 106 N.E. 601 (1914)

Loftus v. Lauf, 108 N.E. 533 (1952)

Long v. Inhabitants of Athol, 82 N.E. 665 (1907)

Lonnquist v. Lammi, 240 Mass. 371 (1922)

Lord v. Wheeler, 1 Gray 282 (1854)

Loring v. City of Boston, 7 Metc. 409 (1843)

Los Angeles Traction Co. v. Wilshire, 135 Cal. 654 (1902)

Louis M. Herman Co., Inc. v. Gallagher Electric Co., Inc., 138 N.E. 2d 120 (1956)

Louisville and Nashville R. R. Co. v. Mottley, 219 U.S. 467 (1911)

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)

Love v. Harvey, 114 Mass. 80 (1873)

L. W. Severance and Sons, Inc. v. Augley, 125 N.E. 2d 415 (1955)

Lydon v. Allstate Ins. Co., 359 N.E. 2d 316 (1977)

Lyons v. Coe, 59 N.E. 59 (1901)

Lynch v. U. S., 292 U.S. 571 (1934)

McCullough v. Eagle Ins. Co., 1 Pick. 278 (1822)

McCulloch v. Maryland, 4 Wheaton 316 (1819)

Mac Donald v. Stack, 189 N.E. 2d 221 (1963)

McFadden v. Nordblom, 30 N.E. 2d 852 (1941)

McKenny v. McKenny, 103 N.E. 631 (1913)

McNabb v. U.S., 318 U.S. 332 (1943)

McNair v. Knott, 302 U.S. 369 (1937)

McNamara v. Boston Elevated Ry. Co., 83 N.E. 878 (1908)

McTernan v. LeTendre, 351 N.E. 2d 566 (1976)

Mackin v. Dwyer, 91 N.E. 893 (1910)

Macy v. Shelburne Falls and Colrain S. & Ry. Co., 210 Mass. 197 (1911)

Magnum Co. v. Fuller, 111 N.E. 399 (1916)

Magrath v. Sheehan, 5 N.E. 2d 547 (1936)

Mann v. United Motor Boston Co., 116 N.E. 239 (1917)

Mansfield v. Gordon, 10 N.E. 773 (1887)

Marcellino v. Carma, Inc., 324 N.E. 2d 629 (1975)

Marine Contractors, Inc., V. Hurley, 365 Mass. 280 (1974)

Marshall v. James, 147 N.E. 740 (1925)

Martin v. Jablonski, 149 N.E. 156 (1925)

Martin v. Meles, 60 N.E. 397 (1901)

Marr v. Heggie, 58 N.E. 2d 1 (1944)

Massachusetts Mutual Life Ins. Co. v. Green, 70 N.E. 202 (1904)

Mayer v. Haycock, 18 N.E. 2d 348 (1938)

Maynard v. Royal Worcester Corset Co., 85 N.E. 877 (1908)

Mead v. Parker, 115 Mass. 413 (1874)

Medeiros v. Petty, 324 N.E. 2d 902 (1975)

Melotte v. Tucci, 66 N.E. 2d 357 (1946)

Mellen v. Johnson, 76 N.E. 2d 658 (1948)

Mellen v. Whipple, 1 Gray 317 (1854)

Meredith Corp. v. Harper and Row Publishers, Inc., 378 F. Supp. 686 (1974)

Merrimack Valley National Bank v. Baird, 363 N.E. 2d 688 (1977)

Metropolitan Coal Co. v. Pontel Co., 81 N.E. 640 (1907)

Meyer v. Estes, 41 N.E. 683 (1895)

Michael Chevrolet, Inc. v. Institution for Savings, 72 N.E. 2d 514 (1947)

Middlesex Co. v. Osgood, 4 Gray 447 (1855)

Milford v. Commonwealth, 10 N.E. 516 (1887)

Mills v. Wyman, 3 Pick. 207 (1825)

Mitsakos v. Morrell, 129 N.E. 294 (1921)

Molloy v. John Hancock Life Ins. Co., 97 N.E. 2d 422 (1951)

Montgomery Ward Co. v. Johnson, 95 N.E. 290 (1911)

Montuori v. Barlen, 194 N.E. 714 (1935)

Morris Gordon and Son v. Totoni, 85 N.E. 2d 219 (1949)

Morse v. Ely, 28 N.E. 577 (1891)

Morse v. Woodworth, 29 N.E. 525 (1892)

Moskew v. Marshall, 171 N.E. 477 (1930)

Moses v. Stevens, 2 Pick. 332 (1824)

Moss v. Old Colony Trust Co., 140 N.E. 803 (1923)

Murphy v. Kilmurrary, 88 N.E. 2d 544 (1949)

Nathan v. Leland, 79 N.E. 793 (1907)

National Machine & Tool v. Standard Shoe Machine Co., 63 N.E. (1902)

National Shawmut Bank of Boston v. Fidelity Mutual Life Ins. Co., 61 N.E. 2d 18 (1945)

National Strike Information Center v. Brandeis University of Waltham, Massachusetts, 315 F. Supp. 928 (1970)

National Vinegar Co. v. Louisiana Light Co., 115 U.S. 650 (1885)

National Vinegar Co. v. Jaffee, 58 N.E. 342 (1900)

Nash v. Lull, 102 Mass. 60 (1869)

N. E. Foundation Co. v. Watrous, Inc., 27 N.E. 2d 756 (1940)

Neel v. Lang, 127 N.E. 512 (1920)

Nelson v. Hamlin, 155 N.E. 18 (1927)

New England Cabinet Works v. Morris, 115 N.E. 315 (1917)

New England Canteen Service, Inc. v. Ashley, 363 N.E. 2d 526 (1977)

Newell v. Hadley, 92 N.E. 507 (1910)

New Jersey v. Wilson, 7 Cranch. 164 (1812)

New Orleans Gas Co. v. Louisiana Light Co., 115 U.S. 650 (1885)

Nickerson v. Bridges, 103 N.E. 939 (1914)

Nickerson v. Weld, 90 N.E. 589 (1910)

Noble v. Mead-Morrison Mfg. Co., 129 N.E. 669 (1921)

Norman v. Baltimore & O. R. R. C., 294 U.S. 240 (1935)

Northwestern Fertilizer Co. v. Hyde Park, 97 U.S. 659 (1876)

Oberg v. Burke, 188 N.E. 2d 566 (1963)

O'Brien v. Boland, 44 N.E. 602 (1896)

O'Conner v. Hurley, et. al., 16 N.E. 764 (1888)

O'Connor v. National Metals Co., 58 N.E. 2d 153 (1944)

O'Donnell Ex'r. v. Smith, 8 N.E. 350 (1886)

Ogden v. Saunders, 12 Wheaton 212 (1827)

O'Leary v. Hayden, 91 N.E. 2d 663 (1950)

Orr v. Koefood, 377 F. Supp. 673 (1974)

Osborn v. Martha's Vineyard R. Co., 5 N.E. 486 (1886)

Papanastos v. Hellar, 116 N.E. 732 (1917)

Palfrey v. Portland, S. & P. R. Co., 4 Allen 55 (1862)

Palmer v. Clark, 106 Mass. 373 (1871)

Peacock v. Board of Regents of Univ. and State Colleges of Arizona, 380 F. Supp. 1081 (1974)

Peck v. Requa, 13 Gray 407 (1859)

Pelletier v. Couture, 19 N.E. 400 (1889)

Pennsylvania Hospital v. Philadelphia, 245 U.S. 20 (1917)

Peretz v. Watson, 324 N.E. 2d 904 (1975)

Perry v. U. S., 294 U.S. 330 (1935)

Peterson v. Bay State Elevator, 162 N.E. 2d 807 (1959)

Phoenix Spring Beverage Co. v. Harvard Brewing Co., 45 N.E. 2d 473 (1942)

Pike v. Anglo South American Trust Co., 166 N.E. 553 (1929)

Pike v. Pike, 165 N.E. 5 (1929)

Pequa Branch of the Bank of Ohio v. Knoojs, 16 Howard 369 (1854)

Poland v. Beale, et. al., 78 N.E. 728 (1906)

Polonsky v. Union Federal Savings and Loan Assoc., 138 N.E. 2d 115 (1956)

Pool v. City of Boston, 5 Cush. 219 (1849)

Putnam v. Grace, 37 N.E. 166 (1894)

Radich v. Hutchins, 95 U.S. 210 (1877)

Railroad Commission of California v. Los Angeles Ry. Corp., 280 U.S. 145 (1929)

Rampey v. Allen, 501 F. 2d 1090 (1974)

Ratner v. Hill, 170 N.E. 69 (1930)

Ready v. Pinkham, 63 N.E. 887 (1902)

Realty Dev. Co., Inc. v. Wakefield Ready Mixed Concrete Co., 100 N.E. 2d 28 (1951)

Republic Pipe and Supply Corp. v. Marnell Construction Corp., 363 N.E. 2d 1361 (1977)

Rhoades v. Secunda, 4 N.E. 2d 449 (1936)

Ribock v. Canner, 105 N.E. 462 (1914)

Rich v. DeAmellar, 318 N.E. 2d 184 (1974)

Richmond Mortgage and Loan Corp. v. Wachovia Bank and Trust Co., 300 U.S. 124 (1937)

Roberts v. Knowlton, 377 F. Supp. 1381 (1974)

Roberts v. Rockbottom Co., 7 Metc. 46 (1843)

Robinson v. Raquet, 1 Cal. App. 2d 533 (1934)

Rock Mfg. Corp. v. Music & Television Corp., 159 N.E. 2d 417 (1959)

Rooney v. Weeks, 194 N.E. 666 (1935)

Rowe v. Peabody, 93 N.E. 604 (1911)

Russo v. Foster, 24 N.E. 2d 666 (1940)

Ryan v. Gilbert, 71 N.E. 2d 219 (1947)

Saget v. Holland, 73 N.E. 2d 731 (1947)

Samborn v. Chamberlain, 101 Mass. 409 (1869)

Sanders v. Pottlitzer Bros. Fruit Co., 144 N.Y. 209 (1894)

Sanford v. Boston Edison Co., 56 N.E. 2d 1 (1944)

Savoy Finance Co. v. DeBiase, 183 N.E. 742 (1933)

Schelling v. Levin, 101 N.E. 2d 360 (1957)

Scott v. McFarland, 13 Mass. 309 (1816)

Schultz v. Frary, 109 N.E. 2d 134 (1952)

Sciaraffa v. Debler, 23 N.E. 2d 111 (1939)

Sears v. Eastern R. Co., 14 Allen 433 (1867)

Seaver v. Phelps, 11 Pick. 304 (1831)

Seaver v. Ransom, 224 N.Y. 233 (1918)

Segal v. Allied Mutual Ins. Co., 285 Mass. 106 (1934)

Shayet v. Holland, 73 N.E. 2d 731 (1947)

Sherman v. Sidman, 14 N.E. 2d 145 (1938)

Shirley v. Kelly, 86 N.E. 293 (1908)

Shopnek v. Rosenbloom, 93 N.E. 2d 227 (1950)

Simpson v. Bright, 153 N.E. 571 (1926)

Skinner v. Tober Foreign Motors, Inc., 187 N.E. 2d 669 (1963)

Slocum v. Metropolitan Life Ins. Co., 139 N.E. 2d 669 (1963)

Smedley v. Walden, 141 N.E. 281 (1923)

Smith v. Gowdy, 8 Allen 566 (1864)

Solomin v. Kaufman, 145 N.E. 431 (1924)

St. Germaine & Son, Inc. v. Taunton Redevelopment Authority, 340 N.E. 2d 916 (1974)

Stadmiller v. Shirmer, 142 N.E. 905 (1924)

Stanley v. Westwood Auto, Inc., 322 N.E. 2d 768 (1975)

Stark v. Parker, 2 Pick. 267 (1824)

Stal v. Barrett, 3 A. 2d 521 (1939)

State v. Earnest, 162 S.W. 2d 338 (1942)

State v. Silva, 525 P. 2d 903 (1974)

Steranko v. Inforex, Inc., 326 N.E. 2d 222 (1977)

Stevens v. Thissell, 134 N.E. 398 (1922)

Stewart v. Keyes, 295 U.S. 403 (1935)

Stiff v. Keith, 9 N.E. 527 (1887)

Stinson v. Meegan, 67 N.E. 2d 465 (1946)

Stoico v. Metropolitan Life Ins. Co., 139 N.E. 816 (1923)

Sturges v. Crowninshield, 4 Wheat. 122 (1819)

Sullivan v. Goulet, 182 N.E. 2d 519 (1962)

Sutcliffe v. Heatley, 122 N.E. 317 (1919)

Swift v. Bennett, 10 Cush. 436 (1852)

Taylor v. Joyce, 4 Cal. App. 2d 612 (1935)

Taylor v. Merchants' Fire Ins. Co., 13 L. Ed. 187 (1850)

Teele v. Rockport Granite Co., 112 N.E. 497 (1916)

Terret v. Taylor, 9 Cranch. 43 (1815)

Texas and N. O. R. Co. v. Miller, 221 U.S. 408 (1911)

The Johnson Clinic, Inc. v. Huffnozle, 310 N.E. 2d (1974)

Thibault v. Lalumiere, 60 N.E. 2d 349 (1945)

Thibeault v. Pickering, 313 N.E. 2d 586 (1974)

Thompson v. Gould, 20 Pick. 134 (1838)

Thurston v. Thorton, 1 Cush. 89 (1854)

Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924)

Tobin v. Larkin, 183 Mass. 389 (1903)

Town of Pawlet v. Clark, 9 Cranch. 292 (1815)

Town Planning and Engineering Associates, Inc. v. Amesbury Specialty Co., Inc., 342 N.E. 2d 706 (1976)

Torrey v. Adams, 149 N.E. 618 (1925)

Tracy v. Brown, 163 N.E. 885 (1928)

Trainee v. Trumbull, 6 N.E. 761 (1886)

Trenton v. New Jersey, 262 U.S. 182 (1923)

Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819)

Tushjian v. Karp, 177 N.E. 816 (1931)

United Shoe Marline Co. v. Kimball, 790 (1907)

United States v. Heinszen and Co., 206 U.S. 370 (1907)

Vander Realty Co., Inc. v. Gabriel, 334 Mass. 267 (1956)

Vannah v. Hart Private Hospital, 117 N.E. 328 (1917)

Varno, et. ux., v. Tindall, 51 S.W. 502 (1932)

Van Hoffman v. City of Quincy, 4 Wallace 535 (1867)

Vickery v. Ritchie, 88 N.E. 835 (1909)

Wagner v. Lectrox Corp., et. al., 348 N.E. 2d 451 (1976)

Wait v. Maxwell, 5 Pick. 217 (1827)

Walsh v. Young, 110 Mass. 396 (1872)

Wasserman v. Roach, 146 N.E. 2d 909 (1958)

Joseph Waterman and Sons, Inc. v. Hock, 141 N.E. 596 (1923)

Watkins v. Simplex Time Recorder Co., 55 N.E. 2d 203 (1944)

Webb v. Lathrop, 112 N.E. 203 (1916)

Weiner v. Slovin, 270 Mass. 392 (1930)

Weinstein v. Miller, 144 N.E. 387 (1924)

Wells v. Callman, 107 Mass. 514 (1871)

Welsch v. Polumbro, 73 N.E. 284 (1947)

Wesley United Methodist Church v. Harvard College, 316 N.E. 2d 620 (1974)

Western River Bridge Co. v. Dix, 6 Howard 507 (1848)

White v. Bigelow, 28 N.E. 904 (1891)

White v. Maynard, 111 Mass. 250 (1872)

White v. Middlesex R. Co., 135 Mass. 216 (1883)

White Spot Construction Co. v. Jet Spray Cooler, Inc., 183 N.E. 2d 719 (1962)

Widebeck v. Sullivan, 99 N.E. 2d 165 (1951)

Wilcox v. Lucos, 121 Mass. 21 (1876)

Wiley v. Bunker Hill National Bank, 67 N.E. 655 (1903)

Wit v. Commercial Hotel Co., 149 N.E. 609 (1925)

Witherington v. Eldridge, 162 N.E. 300 (1928)

Woodell v. John Hancock Mut. Life Ins. Co., 67 N.E. 2d 469 (1946)

Woonsocket Machine and Press Co. v. New York, N. H. & H. R. Co., 131 N.E. 461 (1921)

Worcester Bank and Trust Co. v. Nordblom, 188 N.E. 492 (1933)

Worthen Co. v. Kavanaugh, 295 U.S. 56 (1935)

Worthen Co. v. Thomas, 292 U.S. 426 (1934)

Worthy v. Jones, 11 Gray 168 (1858)

Wright v. Venton Branch of Mountain Trust Bank, 300 U.S. 440 (1937)

Zembler v. Fitzgerald, 125 N.E. 299 (1919)

APPENDIX I

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Legal Terms

Acceptance of Offer: Acceptance of an offer may be defined as an expression of assent to the terms of the offer while the offer is still open.

Accord and Satisfaction: In order to discharge an existing cause of action, both the accord and satisfaction must occur. The accord is a bilateral contract whereas satisfaction is the performance of such contracts.

Action: An ordinary proceeding in a court by which one party prosecutes another for the enforcement or protection of a right, the redress of a wrong, or the punishment of public offense. In common language a "suit," or "Lawsuit."

Action at law: Court action in a law case, as distinguished from equity.

Anticipatory breach: The doctrine of anticipatory breach of a contract is that if one of the parties to a bilateral (executory) contract repudiates it before the day of performance, the other party may institute an action for breach of contract, without waiting for the time of the performance of the contract. This rule is followed

in most states and in the Federal Courts. It is not followed in Massachusetts.

Appellant: A party who takes an appeal from one court to another.

Appellee: The party against whom an appeal is taken.

Assault: An attempt to beat another without touching him (see battery).

Assignor: An assignor is the person who assigns his right under the contract.

Assignee: An assignee is the person to whom the right under the contract has been assigned.

Arrangement: A setting in order.

Avoid a contract: To cancel and make the contract void.

Battery: An unlawful beating or other wrongful physical violence inflicted on another without his consent. Battery includes assault.

Bilateral contract: A bilateral contract is a contract in which there is a promise for an act.

Breach of contract: Failure without legal excuse to perform part or whole of a contract.

Cancellation, Intentional Destruction or Surrender: Contractual duties are discharged by the cancellation or destruction of the document embodying the contract or by its surrender to the party subject to the duty or to someone on his behalf.

Civil Action: One brought to recover some civil right or to obtain redress for some wrong.

Common Law: Legal principles derived from usage and some customs or from court decisions affirming such usages and customs or the Acts of Parliament in force at the time of the American Revolution, as distinguished from law by enactment of American legislature.

Compensatory Damages: Compensatory damages are damages which in the eyes of the court will place the Plaintiff in the position he would have been in if the contract had not been breached.

Condition Concurrent: A condition concurrent is a condition which must be performed by one party at the same time the other party performs. It may be said that the parties to the contract are to perform specific acts simultaneously.

Condition Precedent: A condition precedent is a condition which must happen, or, a condition which is to be performed before any contractual liability arises.

Condition Subsequent: A condition subsequent is a condition referring to a future event. If the future event so specified happens, it gives one of the parties to the contract a right to end the contract.

Consideration in contracts: The inducement, usually an amount of money.

Contract: An agreement upon sufficient consideration, to do or not to do a particular thing; the writing which contains the agreement of the parties with the terms and conditions and which serves as proof of the obligation.

Contract action: An action brought to enforce rights under a contract.

Corporate: Belonging to a corporation.

Corporation: Legal entity or artificial person created by statute who subsists as a body politic, under a special denomination and is vested by the policy of the law with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual.

Creditor beneficiary: A person to whom the promisee owes a duty, e.g., composition with creditors and business subscriptions.

Criminal action: Proceeding by which a party charged with a crime is brought to trial and punishment.

Damages: Damages means a sum of money awarded as compensation for injury caused by a breach of contract.

Decree: Order of court of equity announcing the legal consequences of the facts found.

Defendant: The party against whom relief or recovery is sought in a court of action.

Defense: That which is offered and alleged by Defendant as a reason in law or fact why Plaintiff should not recover.

Discharge by Avoidance of Voidable Duties: A voidable contractual duty is discharged by the affirmative action required for the exercise of the power of avoidance.

Donee: The person receiving the power or gift.

Donee beneficiary: A person to whom the promisee does not owe a duty, e.g., a promise made to a father for the benefit of his son; a beneficiary of a trust.

Donor: The person conferring the power or a gift.

Duress: Duress may be defined as any unlawful constraint exercised on a person so that he is forced to do something that he otherwise would not have done.

Emancipation of child: Surrender of the right to care, custody and earnings of a child by its parents who at the same time renounce parental duties.

Enjoin: To require a person by writ of injunction from a court of equity to perform, or to abstain, or restrict from, some act.

Equity: Field of jurisprudence differing in origin, theory, and methods from the common law.

Estoppel: An estoppel involves a change of position of the parties so that the party against whom estoppel is invoked has received a profit or benefit or the party invoking estoppel has changed his position to his detriment.

Executed contract: A completed contract.

Executory contract: An incompletely performed contract.

Executor: Person designated by testator to carry out wishes expressed in will.

Felony: Crime punishable by imprisonment in State prison or by death.

Fraud: Fraud is defined as a false misrepresentation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed.

Holder in due course: A holder in due course is a person who took a bill (check or note) in good faith and for value and that at the time it was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

Injunction: A judicial process requiring the person to whom it is directed to do or refrain from doing a particular thing.

Intestacy: The condition or state of not leaving a will at one's death.

Intoxicated: Intoxicated is defined by case law to mean under the influence of an intoxicating liquor. Thus, an intoxicated person is a person under the influence of an intoxicating liquor.

Law: 1) System of principles and rules of human conduct which includes decisions of courts and acts of legislature.

2) An enactment of a legislature, a statute.

Liability: Legal responsibility.

License: Permission, conferring right to do some act which would otherwise be illegal.

Liquidated damages: Liquidated damages may be defined as specific sums of money agreed upon by the parties, to be recovered by either of the contracting parties for breach of the contract.

Malice: Intentional doing of a wrongful act without excuse or just cause.

Malfeasance: Commission of an unlawful act.

Merger: A merger involves a discharge of the contractual obligation by operation of law.

Misfeasance: Improper performance of a lawful act.

Necessaries: Necessaries have been defined as indispensable things or things proper and useful for the sustenance of human life.

Novation: A novation involves a substitution of a new party with a discharge of one of the original parties by an agreement of all these parties. A new contract is created with the same terms as the original one but only the parties are changed.

Occurrence of a Condition Subsequent: Where there has been a breach of contractual duty followed by the happening of a condition subsequent to the duty of the wrongdoer, his duty is thereby discharged.

Offeree: The person who accepts the offer is termed the offeree.

Offeror: The person who makes the offer is termed the offeror.

Parole-Evidence Rule: Oral evidence as to matters not contained in a written contract or other instrument is not admissible.

Plaintiff: Person who brings action; he who sues by filing a complaint.

Police Power: Power inherent in every sovereign state to enact law within constitutional limits to promote the order, health, education and welfare of society.

Promisee: One to whom a promise has been made.

Promisor: One who makes a promise.

Promissory: In the nature of a promise.

Promissory Estoppel: That which arises when there is a promise which the promisor should reasonably expect to induce forbearance or action of a definite and substantial character on the part of the promisee, and which does not induce such forbearance or action, and such promise is binding if injustice can be avoided only by the enforcement of the promise.

Promissory Note: A written promise or engagement to pay a sum certain within a limited time or on demand, or at sight, to a person named therein, or to his order, or bearer.

Quantum meritum: An implication that the defendant had promised to pay Plaintiff as much as he reasonably deserved for work or labor.

Ratification: By ratification of a contract is meant the affirmation or confirmation of an act previously done either by the party himself or another.

Registered: Entered or recorded in some official register or record or list.

Release of Covenant Not to Sue: A contractual obligation may be discharged by a release or covenant not to sue if under seal or based on consideration.

Rescission of contract: Cancellation or abrogation by the parties or one of them.

Repudiation: Repudiation may be defined as a rejection. In terms of a contract, it consists usually of an absolute and unequivocal declaration on the part of the promisor to the promisee that he will not make performance on the future day that the contract calls for performance. It is in the nature of an anticipatory breach before the performance is due.

Restitution: Restitution means the act of making good or giving the equivalent for the loss. The measure of recovery is the reasonable value of the Plaintiff's performance. It is available only where there has been a total breach of the contract. If the breach of the contract is partial the remedy is in damages.

Right of Contribution: By the right of contribution is meant the right to reimbursement. It is the act of co-debtors (here co-promisors) in reimbursing one of their group who has paid the entire debt, each to the extent of their liability.

Right under Contract: The parties to the contract have rights under the contract. There must be a privity of contract between Plaintiff and Defendant in order to render the Defendant liable to the Plaintiff on the contract.

Specific Performance: Specific performance means the performance of the contract terms in as near as possible as the way as agreed upon.

Statute: Act of legislature.

Statute of Frauds: The Statute of Frauds is a set of statutes which was legislated for the purpose of preventing fraud. The Statute of Frauds requires that specific contracts to be enforceable must be in writing and signed by the parties to be charged. If the contract itself is not in writing, a memorandum of it signed by the persons to be charged must be produced.

Substituted Performances: Substituted performance is performance of a contract whose terms were varied by a subsequent parol agreement which affected the mode of performance of the contract only.

Testacy: The condition or state of leaving a will at one's death.

Testator: Person who makes the will.

Third Party Beneficiary: A person who acquires rights in a contract entered into for his benefit. He is not a party to the contract.

Tort: Legal wrong committed upon the person or property of another independent of contract.

Trover Remedy for any wrongful interference with or detention of the goods of another.

Unconscionable Contract: An unconscionable contract is one which a person of sound mind would not make. It is also one in which a fair and honest person would not accept.

Unilateral Contract: An unilateral contract is a contract in which there is a promise for the act.

Ultra Vires: Acts beyond the scope of authority.

Void: Ineffectual, having no legal force binding effect.

Voidable: That which may be voided or declared void.

Will: An instrument by which a person makes a disposition of his property to take effect after his decease, and which is, in its own nature, ambulatory and revocable during his life.

APPENDIX II

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Case Citations: Sampled Cases

Expressed and Implied Contracts

Barker-Scotia College Inc. v. City of New York, 390 F.Supp. 525 (1975).

Billmeyre v. Sacred Heart Hospital of the Sisters of Charity, Inc., 331 A. 2d 313 (1975).

Board of Trustees of Howard Community College v. John K. Ruff, Inc., 366 A. 2d 360 (1976).

Board of Trustees of the State College of Maryland v. Sherman, 373 A. 2d 626 (1977).

DeBonis v. Hudson Valley Community College, 389 N.Y.S. 2d 647 (1976).

Goodyear v. Junior College District St. Louis, 540 S.W. 2d 621 (1976).

Healy v. Larson, 323 N.Y.S. 2d 625 (1971).

Hvac and Sprinkler Contractor Association, Inc. v. The State University Construction Fund, 364 N.Y.S. 2d 422 (1975).

Mahavougsana v. Hall, 401 F.Supp. 381 (1975).

Mahavougsana v. Hall, 529 F. 2d 448 (1976).

Middlebury College v. Chandler, 16 Vermont 683 (1844).

Neal v. Junior College District of East Central Missouri, 556 S.W. 2d 580 (1977).

People v. New York Law School, 22 N.Y.S. 663 (1893).

Powe v. Miles, 407 U.S. 2d 73 (1968).

Trustees of Stigamatine Fathers Inc. v. Secretary of Administration and Finance, 341 N.E. 2d 662 (1976).

Offer and Acceptance

Board of Governors v. Building Systems Housing Corp., 233 N.W. 2d 195 (1975).

Carrol v. Onodaya Community College, 384 N.Y.S. 323 (1976).

Commonwealth v. Howell, 181 A. 2d 903 (1962).

DeMarco v. University of Health Sciences, 352 N.E. 2d 356 (1976).

Eden v. Board of Trustees of State University, 374 N.Y.S. 2d 686 (1975).

Franklin v. Atkins, 409 F. Supp. 439 (1976).

Gorman v. Univ. of Miami, 340 So. 2d 1180 (1977).

Gras v. Clark, 361 N.E. 2d 316 (1977).

Jacobsen v. Leonard, 406 F. Supp. 515 (1976).

Krawez v. Stans, 306 F. Supp. 1230 (1969).

McLachlan et al. v. Tacoma Community College District No. 22., 541 P. 2d 1010 (1975).

Quigley v. Capalonga, 383 N.Y.S. 2d 935 (1976).

Runyon v. McCrary, 96 S.Ct. 2596 (1976).

Steinberg v. Chicago Medical School, 354 N.E. 2d 586 (1976).

State ex rel Chapdelaine v. Torrence, 532 S.W. 2d 542 (1975).

Tuskega Inst. v. May Refrigeration Co., Inc., 344 So. 2d 156 (1977).

University of Colorado v. Silverman, 555 P. 2d 115 (1976).

Consideration

Green v. Richmond, 337 N.E. 2d 691 (1975).

Capacity

Brown v. Wichita State University, 540 P. 2d 66 (1975).

Connecticut State Employees Association v. Board of Trustees of University of Connecticut, 345 A. 2d 36 (1974).

Sterling v. University of Michigan, 68 N.W. 253 (1896).

Fraud, Mistake and Duress

Holstrop v. Board of Junior Colleges, 523 F. 2d 569 (1975).

Tobin v. Louisiana State Board of Education, 319 So. 2d 822 (1975).

Van Buren v. Pima Community College, 540 P. 2d 763 (1975).

Illegality

Civil Service Employees Association Inc. v. State University of Stonybrook, 368 N.Y.S. 2d 927 (1974).

First Equity Corp. of Florida v. Utah State University, 544 P. 2d 887 (1975).

State ex. rel. Sigall et al. v. Aetna Cleaning Contractors of Cleveland, Inc. et al., 353 N.E. 2d 913 (1974).

Performance and Breach

Abrams v. New School for Social Research, 390 N.Y.S. 2d 818 (1976).

Alberti v. County of Erie, 360 N.Y.S. 2d 343 (1974).

American Association of University Professors, Bloomfield College Chapter v. Bloomfield College, 322 A. 2d 846 (1974).

American Training Services Inc. v. Commerce Union Bank, 415 F. Supp. 1101 (1976).

Anapol v. University of Delaware, 412 F. Supp. 675 (1976).

Appel Media v. Clarion State College, 327 A. 2d 420 (1974).

Barrett v. Eastern Iowa Community College District, 221 N.W. 2d 781 (1974).

Basch v. George Washington University, 370 A. 2d 1364 (1977).

Begley v. The Corporation of Mercer University, 367 F. Supp. 908 (1973).

Blouin v. Lyola University, 506 P. 2d 20 (1975).

Board of Regents v. Roth, 408 U.S. 564 (1972).

Board of Regents of the University of Texas v. S & G Construction Co., 592 S.W. 2d 90 (1975).

Brady v. Board of Trustees of Nebraska State Colleges, 242 N.W. 2d 616 (1976).

Bruce v. Board of Regents for North West Missouri State University, 414 F. Supp. 559 (1976).

Burdeau v. Trustees of California State College, 507 F. 2d 770 (1974).

Busbee v. Georgia Conference A.A.U.P., 221 S.E. 2d 437 (1975).

Cannon v. Stevens School of Business, Inc., 560 P. 2d 1383 (1977).

Collins v. Wolfson, 498 F. 2d 1100 (1975).

Chung v. Park, 337 F. Supp. 524 (1974).

Curator of University of Missouri v. Nebraska Prestressed Concrete Co., 526 S.W. 2d 903 (1975).

Decker v. Worcester Junior College, 336 N.E. 2d 909 (1975).

Ducorbier v. Board of Supervisors of Louisiana State University, 386 F. Supp. 202 (1974).

Endress v. Brookdale Community College, 364 A 2d 1080 (1976).

Feldman v. Regents of New Mexico, 540 P. 2d 872 (1975).

Georgia Association of Education v. Harris, 403 F. Supp. 961 (1975).

Giles v. Howard University, 428 F. Supp. 603 (1977).

Green v. Howard University, 271 F. Supp. 609 (1967).

Grimm v. Cates, 532 F. 1034 (1976).

Gupta v. Boyer, 391 N.Y.S. 2d 255 (1977).

Jessen Associates v. Bullock, 531 S.W. 2d 593 (1975).

Jones v. Vassar College, 299 N.Y.S. 2d 283 (1969).

Kalme v. West Virginia Board of Regents, 539 F. 2d 1346 (1976).

Kilcoyne v. Morgan, 405 F. Supp. 828 (1975).

King v. Conservatorio de Musica de Puerto Rico, 378 Supp. 746 (1974).

La Temple v. Wamsley, 549 F. 2d 185 (1977).

Lyman v. Swartley, 385 F. Supp. 661 (1974).

Lyons v. Salve Regina College, 422 F. Supp. 1354 (1976).

McClanahan v. Cochise College, 540 P. 2d 744 (1975).

Michigan College Federation of Teachers v. Lake Michigan Community College, 518 F. 2d 1091 (1975).

Miller v. Long Island University, 380 N.Y.S. 2d 917 (1976).

Nace v. Oregon State System of Higher Education, 543 P. 2d 687 (1975).

Papadopoulous v. Board of Higher Education, 511 P. 2d 854 (1973).

People v. New York Law School, 22 N.Y.S. 663 (1893).

Perry v. Sinderman, 408 U.S. 600 (1972).

Phillips v. Puryear, 403 F. Supp. 80 (1975).

Phillips v. Santa Fe Community College, 342 So. 2d 108 (1977).

Pryles v. State, 380 N.Y.S. 2d 628 (1975).

Robertson v. District of Columbia Board of Higher Education, 359 A. 2d 28 (1976).

Schlecting v. Bergstrom, 511 P. 2d 846 (1973).

Shaw v. Board of Trustees of Frederick Community College, 549 F. 2d 929 (1976).

Shepphard v. West Virginia Board of Regents, 378 F. Supp. 4 (1974).

Simon v. Boyer, 380 N.Y.S. 2d 178 (1976).

Skehan v. Board of Trustees of Bloomsberg State College, 538 F. 2d 53 (1976).

Smith v. Greene, 545 P. 2d 550 (1976).

Talandi Construction Corp. v. Illinois Building Authority, 321 N.E. 2d 154 (1974).

Trivier v. Atlanta University Inc., 234 S.E. 2d 342 (1977).

Tyler v. College of William and Mary, 429 F. Supp. 29 (1977).

Vallejo, v. Jamestown College, 244 N.W. 2d 753 (1976).